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# **IDAHO CODE**

CONTAINING THE

## **GENERAL LAWS OF IDAHO**

### **ANNOTATED**

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Compiled Under the Supervision of the  
Idaho Code Commission

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**TITLES 44-48**



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## **PUBLISHER'S NOTE**

Since the publication in 1996 of Replacement Titles 44-48, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for Titles 44-48 has made it necessary to revise this volume. Accordingly, Replacement Titles 44-48 are issued with the approval and under the direction of the Idaho Code Commission.

To better serve our customers, by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, court decisions are now being read as they are released by the courts. A consequence of this more current reading of cases, as they are posted on *lexis.com*, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the enacted by the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of March 14, 2003. These cases will be printed in the following reports:

Pacific Reporter, 3rd Series  
Federal Supplement, 2nd Series  
Federal Reporter, 3rd Series  
United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Additionally, annotations have been taken from the following sources:

American Law Reports, 5th Series, through Volume 103  
American Law Reports, Federal Series, through Volume 181  
Opinions of Attorney General, 2002-2

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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## **USER'S GUIDE**

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In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included herein. This guide contains comments and information on the many features found within the Idaho Code intended to increase the usefulness of this set of laws to the user. See the first volume of this set for the complete User's Guide.





## **ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE**

<b>1997</b> .....	<b>March 19, 1997</b>
<b>1998</b> .....	<b>March 23, 1998</b>
<b>1999</b> .....	<b>March 19, 1999</b>
<b>2000</b> .....	<b>April 5, 2000</b>
<b>2001</b> .....	<b>March 30, 2001</b>
<b>2002</b> .....	<b>March 15, 2002</b>
<b>2003</b> .....	<b>May 3, 2003</b>



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## TITLE 44

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### CHAPTER 1

#### DEPARTMENT OF LABOR AND INDUSTRIAL SERVICES

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- 44-101. [Repealed.]  
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- 44-105 — 44-109. [Amended and Redesignated.]  
44-110 — 44-118. [Repealed.]  
44-119. [Repealed.]  
44-120. [Repealed.]

#### **44-101. Department of labor and industrial services. [Repealed.]**

**Compiler's notes.** This section which comprised 1949, ch. 254, § 1, p. 511; am. 1974, ch. 39, § 2, p. 1023; am. 1980, ch. 117, § 1, p. 255;

am. 1984, ch. 123, § 37, p. 281 was repealed by S.L. 1996, ch. 421, § 7, effective July 1, 1996.

#### **44-102. Director of department. [Repealed.]**

**Compiler's notes.** This section, which comprised 1949, ch. 254, § 2, p. 511; am.

1974, ch. 39, § 3, p. 1023, was repealed by S.L. 1996, ch. 421, § 7, effective July 1, 1996.

#### **44-103. Duties of the director. [Repealed.]**

**Compiler's notes.** This section which comprised 1949, ch. 254, § 3, p. 511; am. 1974, ch. 39, § 4, p. 1023; am. 1974, ch. 119, § 1, p. 1290; am. 1980, ch. 117, § 2, p. 255; am. 1984,

ch. 123, § 38, p. 281; am. 1988, ch. 264, § 23, p. 519, was repealed by S.L. 1996, ch. 421, § 7, effective July 1, 1996.

**44-104. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-104 was amended and redesignated as § 39-4130 (now repealed) by § 8 of S.L. 1996, ch. 421.

**44-104A. [Amended and Redesignated.]**

**Compiler's notes.** Section 6 of S.L. 1974, ch. 39, was amended and redesignated as § 44-105.

**44-104B. [Amended and Redesignated.]**

**Compiler's notes.** Section 20 of S.L. 1974, ch. 39, was amended and redesignated as § 44-119 (now repealed).

**44-105. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-105, which was former § 44-104A as amended, was amended and redesignated as § 39-4131 (now repealed) by § 9 of S.L. 1996, ch. 421.

Another former section 44-105, which comprised S.L. 1949, ch. 254, § 5, p. 511, was repealed by S.L. 1974, ch. 39, § 1.

**44-106. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-106 was amended and redesignated as § 72-1381 by § 10 of S.L. 1996, ch. 421.

**44-107. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-107 was amended and redesignated as § 72-1382 by § 11 of S.L. 1996, ch. 421.

**44-107A. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-107A was amended and redesignated as § 72-1383 (now repealed) by § 12 of S.L. 1996, ch. 421.

**44-107B. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-107B was amended and redesignated as § 72-1384 (now repealed) by § 13 of S.L. 1996, ch. 421.

**44-108. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-108 was amended and redesignated as § 72-1385 by § 14 of S.L. 1996, ch. 421.



**44-109. [Amended and Redesignated.]**

**Compiler's notes.** Former § 44-109 was amended and redesignated as § 44-1812 by § 15 of S.L. 1996, ch. 421.

Another former § 44-109 which comprised 1893, p. 152, § 5; am. 1895, p. 160, § 4; reen. 1899, p. 221, § 5; reen. R.C., § 202; reen. C.L.

228:4; C.S., § 5473; I.C.A., § 46-104; am. 1951, ch. 211, § 2, p. 439; am. 1969, ch. 35, § 6, p. 74; I.C., § 47-104 as amended and changed to § 44-109 by S.L. 1974, ch. 39, § 10, p. 1023, was repealed by S.L. 1980, ch. 117, § 3.

**44-110 — 44-118. Examination of mines — Complaints to director — Neglect of mine owner — Inspectors — Accidents — Records — Reports — Safety inspections. [Repealed.]**

**Compiler's notes.** These sections, which comprised 1893, p. 152, §§ 2, 6, 7, 9; am. 1895, p. 160, §§ 1, 2, 5, 6, 8, 10, 12, 13; reen. 1899, p. 221, §§ 1—3, 6—8, 10, 12, 13; reen. R.C., §§ 199, 200, 203—205, 207, 209; am. 1911, ch. 199, § 1, p. 663; reen. C.L. §§ 228:1, 228:2, 228:5—7, 228:9, 228:11; C.S., §§ 5470, 5471, 5474—5476, 5478, 5480; am. 1921, ch. 24, § 1, p. 32; am. 1927, ch. 131, § 1, p. 174; I.C.A., §§ 46-101, 46-102, 46-105—46-107, 46-109, 46-111; am. 1941, ch. 48, § 1, p. 103; am. 1945, ch. 29, § 1, p. 36; am. 1949, ch. 173,

§ 1, p. 370; am. 1951, ch. 25, § 1, p. 37; am. 1953, ch. 216, § 2, p. 380; am. 1957, ch. 316, § 2, p. 674; am. 1961, ch. 325, § 1, p. 617; am. 1967, ch. 126, § 1, p. 294; am. 1969, ch. 35, §§ 2, 3, 7—10, p. 74; am. 1969, ch. 186, §§ 1, 2, p. 551; am. 1971, ch. 136, § 33, p. 522; I.C., §§ 47-101, 47-102, 47-105—47-107, 47-109, 47-111, 47-114, 47-115 as amended and redesignated §§ 44-110—44-118 by S.L. 1974, ch. 39, §§ 10—19, p. 1023, were repealed by S.L. 1980, ch. 117, § 3.

**44-119. Federal aid. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 44-104B, as added by 1971, ch. 249, § 1, p. 1004; I.C., § 44-104B as amended and changed to § 44-119 by S.L.

1974, ch. 39, § 20, p. 1023, was repealed by S.L. 1996, ch. 421, § 16, effective July 1, 1996.

**44-120. Mine safety advisory board. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 44-120, as added by 1974, ch. 119, § 2, p. 1290, was repealed by S.L. 1980, ch. 117, § 3 which was approved by the governor March 20, 1980. However, it was also amended by § 44 of S.L. 1980, ch. 247 which was approved by the governor March 31, 1980. As amended by § 44 it read: "44-120. Mine safety advisory board. — (1) There is hereby created in the department of labor and industrial services a mine safety advisory board hereinafter referred to as the 'board': consisting of seven (7) members, three (3) of whom shall be persons qualified by experience and affiliation to present the viewpoint of operators of both surface and underground mines and three (3) of whom shall be persons qualified by experience and affiliation to present the viewpoint of workers in both surface and underground mines, and one (1) who shall be a representative of the state industrial commission. The members of the board shall be appointed by the governor of the state of Idaho for a term of four (4) years. The governor of the state of Idaho shall fill

any vacancies which may, from time to time, arise on said board for the remaining term of office of such member who has resigned, is removed from office, or for some reason is unable to carry out the responsibilities of his office.

"(2) The mine safety advisory board shall meet at such times as the director of the department of labor and industrial services or three (3) members of the board shall deem necessary in order to perform those duties as set forth in this chapter. Meetings by the mine safety advisory board shall not be less frequent than once each year, and at least once each year said mine safety advisory board shall review mine safety regulations and make recommendations regarding changes thereof deemed necessary.

"(3) Members of the board shall be compensated as provided by section 59-509(b), Idaho Code, while attending meetings of the board as provided for by the state board of examiners. The director of the department of labor and industrial services is hereby authorized to provide the board with such clerical, tech-

nical, legal and other assistance as shall be necessary to permit the board to perform its duties as provided in this chapter."

## CHAPTER 2

### EMPLOYER DUTIES

#### SECTION.

44-201. Employer duties.

44-202. Employee assistance programs.

44-203 — 44-211. [Repealed.]

**44-201. Employer duties.** — (1) It is unlawful for any employer to maintain a blacklist, or to notify any other employer that any current or former employee has been blacklisted by such employer, for the purpose of preventing such employee from receiving employment.

(2) An employer who in good faith provides information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of that employee, at the request of the prospective employer of that employee, or at the request of the current or former employee, may not be held civilly liable for the disclosure or the consequences of providing the information.

There is a rebuttable presumption that an employer is acting in good faith when the employer provides information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of that employee, at the request of the prospective employer of that employee or at the request of the current or former employee.

The presumption of good faith is rebuttable only upon showing by clear and convincing evidence that the employer disclosed the information with actual malice or with deliberate intent to mislead.

For the purposes of this section, "actual malice" means knowledge that the information was false or given with reckless disregard of whether the information was false. [I.C., § 44-201, as added by 1996, ch. 131, § 1, p. 453.]

**Compiler's notes.** Former § 44-201, which comprised 1915, ch. 169, § 1, p. 388; compiled and reen. C.L. 97:1; C.S., § 2297; I.C.A., § 43-201, was repealed by S.L. 1982, ch. 33, § 1.

**Sec. to sec. ref.** This chapter is referred to in § 72-1712.

**Collateral References.** Validity, construction, and operation of state blacklisting statutes. 95 A.L.R.5th 1.

**44-202. Employee assistance programs.** — (1) As used in this section:

(a) "Provider" means any professional licensed under the laws of this state whose communications with clients or patients are subject to any requirement of confidentiality or privilege pursuant to the laws, regulations, or rules of court of this state and who provides professional services to employee assistance program participants.

(b) "Participants" means employees eligible to participate in an employee assistance program and all others eligible to participate in an employee assistance program by virtue of their relationship to an employee.



(c) "Employee assistance program" means a program established by an employer for the benefit and convenience of its employees pursuant to which participants access the professional services of one (1) or more providers regardless of who is responsible for the payment of any fees charged for such services, and regardless of the type of employment or business relationship, if any, that the employer has with the providers involved.

(2) No provider shall disclose to an employer, and no employer shall be entitled to obtain disclosure of, a communication from a participant that is privileged from disclosure, or required to be kept confidential by a provider, under the laws, regulations or rules of court of this state. No employer shall be held liable in any degree on the basis of any communication between a participant and a provider unless the employer actually knew, or should have known, of the information communicated before the alleged breach of duty or harm occurred. The nature of the employment or business relationship between the employer and the provider shall not be a consideration in determining whether an employer actually knew of the information communicated between a participant and a provider.

(3) No participant shall be required to waive the confidential or privileged nature of any communication as a condition of participating in an employee assistance program, but this subsection shall not apply to an employer's referral of an employee to a provider which is a condition of the employee's continued employment. [I.C., § 44-202, as added by 1999, ch. 366, § 2, p. 967.]

**Compiler's notes.** Former § 44-202, C.S., §§ 2298 — 2307; I.C.A., §§ 43-202 — 43-211, was repealed by S.L. 1982, ch. 33, § 1. which comprised 1915, ch. 169, §§ 2-11, p. 388; compiled and reen. C.L. 97:2 — 97:11;

#### **44-203 — 44-211. Municipal employment agencies — Equipment — Fees — Clerks — Penalties. [Repealed.]**

**Compiler's notes.** These sections, which §§ 2298 — 2307; I.C.A., §§ 43-202 — 43-211 comprised 1915, ch. 169, §§ 2-11, p. 388; were repealed by S.L. 1982, ch. 33, § 1. compiled and reen. C.L. 97:2 — 97:11; C.S.,

### **CHAPTER 3**

#### **PRIVATE EMPLOYMENT AGENCIES**

##### **SECTION.**

**44-301 — 44-303. [Repealed.]**

#### **44-301 — 44-303. Private employment agencies — License — Bond — Penalty. [Repealed.]**

**Compiler's notes.** These sections, which I.C.A., §§ 43-301 — 43-303) were repealed by comprised (1901, p. 131, §§ 1-3; reen. R.C. & S.L. 1982, ch. 33, § 1. C.L., §§ 1443 — 1445; C.S., §§ 2308 — 2310;

## CHAPTER 4

## FORMER FEDERAL EMPLOYMENT SYSTEM

## SECTION.

44-401 — 44-403. [Repealed.]

**44-401 — 44-403. Former federal employment system. [Repealed.]**

**Compiler's notes.** These sections, which comprised 1935 (1st E.S.), ch. 22, §§ 1-5, p. 91, were repealed by S.L. 1986, ch. 24, § 1.

## CHAPTER 5

## PROTECTION OF MECHANICS

## SECTION.

44-501. Employers to make statement.

44-502. Statement before employing mechanics and laborers — Recording and posting.

## SECTION.

44-503. Violation of chapter a misdemeanor.

**44-501. Employers to make statement.** — It shall be the duty of any person, persons, company or corporation engaged in working any mine, mines, mining premises or in developing any mining claim or claims, whether quartz or placer, or in the running of any tunnel, or in the erection or repair of any building or other structure, or in the construction of any canal, ditch, railroad, wagon road or aqueduct, in every case where mechanics or laborers are employed in or about the properties above-mentioned to make, record and publish a statement under oath, setting forth the following data:

1. The name or names of the owner or owners of the mine, mines, mining claims or premises, tunnel, building, canal, ditch, railroad, wagon road, aqueduct or other structure upon which work is being done or upon which it is intended to begin work.

2. The name or names of the person, persons, company or corporation engaged in, or who contemplates engaging in, work upon any of the properties or structures mentioned herein.

3. The conditions under which said person, persons, company or corporation is prosecuting said work, whether as owner, agent, lessee, contractor, subcontractor, contemplative purchaser or lienholder.

4. The principal office of said person, persons, company or corporation and, if a corporation, the state or county where incorporated and the agent in this state on whom service may be had.

5. The day of the week or month when payment of the laborers, mechanics and materialmen will be made, and the place where said payments will be made.

6. A statement of all mortgages and liens against the property on which work is being done, with the amount of each of said encumbrances and whether or not the same is due. [1899, p. 365, §§ 1, 2; compiled and reen. R.C. & C.L., § 1446; C.S., § 2311; I.C.A., § 43-401.]



**Cross ref.** Mechanics' liens, § 45-501 et seq.

**Notice by Agent.**

Notice posted at mine that certain person,

as trustee for others, was employer is not sufficient to bind such other without their knowledge, since it is merely a statement by agent. *Groome v. Fisher*, 48 Idaho 771, 284 P. 1030 (1930).

**44-502. Statement before employing mechanics and laborers — Recording and posting.** — Any person, persons, company or corporation who shall engage in working, developing or prospecting any mine, mines, mining claim or premises, or in running any tunnel, or in repairing or erecting any building, or in constructing any canal, ditch, railroad, wagon road, aqueduct or other structure, and shall employ any mechanics or laborers in prosecuting said work, shall, before employing said mechanics or laborers or any of them, make a statement under oath containing the data provided for in § 44-501, and file the same for record in the office of the recorder of the county in which said labor is being done, and if there be a district recorder, then also in the office of said district recorder of the district where said mechanics or laborers are employed, and also to post similar statements in his or its office, at the place where the payment of wages is to be made, and in a public and conspicuous place where it can be easily seen at or near the place where said mechanics or laborers are employed. [1899, p. 365, §§ 3, 4; compiled and reen. R.C. & C.L., § 1447; C.S., § 2312; I.C.A., § 43-402.]

**44-503. Violation of chapter a misdemeanor.** — Any person, persons, company or corporation, or any managing agent violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100, or by imprisonment in the county jail for not exceeding three (3) months. [1899, p. 365, § 5; reen. R.C. & C.L., § 1448; C.S., § 2313; I.C.A., § 43-403.]

## CHAPTER 6

### UNION LABELS

**SECTION.**

44-601. Unlawful to counterfeit union label.

44-602. Penalty for counterfeiting union label.

44-603. Record of label.

44-604. Penalty for fraudulent record.

44-605. Injunction and damages for infringement.

**SECTION.**

44-606. Penalty for unauthorized use of label.

44-607. Penalty for unauthorized use of name.

**44-601. Unlawful to counterfeit union label.** — Whenever any person, or any association or union of workingmen, has heretofore adopted or used, or shall hereafter adopt or use, any label, term, design, device or form of advertisement, other than a trade-mark or a service mark, for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other products of labor, as having been made, manufactured, produced, prepared, packed or put on sale, by such person, or association, or union of workingmen, or by a member or members of such

association or union, it shall be unlawful to counterfeit or imitate such label, term, design, devise [device] or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, term, design, devise [device] or form of advertisement. [1897, p. 123, § 1; reen. 1899, p. 316, § 1; reen. R.C. & C.L., § 1449; C.S., § 2314; I.C.A., § 43-501; am. 1965, ch. 306, § 1, p. 818.]

**Compiler's notes.** The bracketed word "device" was inserted by the compiler.

**Cross ref.** Injunction and damages for infringement of union label, etc., § 44-605.

Penalty for counterfeiting union label, § 44-602.

Penalty for fraudulent record of label, etc., § 44-604.

Penalty for unauthorized use of union label, etc., § 44-606.

Record of label, § 44-603.

Registration of trade-marks, § 48-503.

Trade-marks, §§ 48-501 — 48-518.

**Sec. to sec. ref.** This section is referred to in § 44-603.

**Collateral References.** 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 336.

Protection, as trademark, of union label, shop card, or other insignia denoting union shop or workmanship. 42 A.L.R.2d 718.

**44-602. Penalty for counterfeiting union label.** — Whoever counterfeits or imitates any such label, term, design, device or form of advertisement, or sells, offers for sale, or in any way utters, or circulates any counterfeit or imitation of any such label, term, design, devise [device] or form of advertisement, other than a trade-mark or a service mark; or keeps or has in his possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise or other product of labor to which or on which any such counterfeit or imitation is printed, painted, stamped or impressed; or knowingly sells or disposes of any goods, wares, merchandise or other product of labor contained in any box, case, can or package, to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed; or keeps or has in his possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise or other product of labor in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, painted, stamped or impressed, shall be guilty of a misdemeanor and be punished by a fine of not more than \$100, or by imprisonment for not more than three (3) months. [1897, p. 123, § 2; reen. 1899, p. 316, § 2; reen. R.C. & C.L., § 1450; C.S., § 2315; I.C.A., § 43-502; am. 1965, ch. 306, § 2, p. 818.]

**Compiler's notes.** The bracketed word "device" was inserted by the compiler.

**Collateral References.** 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 336.

Punitive or exemplary damages as recoverable for trade-mark infringement or unfair competition. 47 A.L.R.2d 1117.

**44-603. Record of label.** — Every such person, association or union, that has heretofore adopted or used, or shall hereafter adopt or use, a label, term, design, device or form of advertisement, other than a trademark or a service mark, as provided in section 44-601, Idaho Code, may file the same for record in the office of the secretary of state, by leaving two (2) copies, counterparts or facsimiles thereof with said secretary, and by filing there-



with a sworn application specifying the name or names of the person, association or union on whose behalf such label, term, design, device or form of advertisement shall be filed; the class of merchandise and a description of the goods to which it has been or is intended to be appropriated, stating that the party so filing or on whose behalf such label, term, design, device, or form of advertisement shall be filed, has the right to use of the same; that no other person, firm, association, union or corporation has a right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the facsimile or counterparts filed therewith are true and correct. There shall be paid for such filing and recording a fee of twenty dollars (\$20.00). Said secretary shall deliver to such person, association, or union, so filing or causing to be filed any such label, term, design, device or form of advertisement, so many duly attested certificates of the recording of the same as such person, association, or union may apply for, for each of which certificates said secretary shall receive a fee of twenty dollars (\$20.00). Any such certificate of record shall, in all suits and prosecutions under this chapter, be sufficient proof of the adoption of such label, term, design, device or form of advertisement. Said secretary of state shall not record for any person, union, or association, any label, term, design, device or form of advertisement that would probably be mistaken for any label, term, design, device or form of advertisement theretofore filed by or on behalf of any other person, union or association.

(2) Registration of a label, term, design, device, or form of advertisement hereunder shall be effective for a term of ten (10) years from the date of registration and, upon application filed within six (6) months prior to the expiration of such term, on a form to be furnished by the secretary of state, the registered label, term, design, device or form of advertisement may be renewed for a like term. A renewal fee of twenty dollars (\$20.00), payable to the secretary of state, shall accompany the application for renewal of the registration. A label, term, design, device or form of advertisement registration may be renewed for successive periods of ten (10) years in like manner. The secretary of state shall notify registrants of labels, terms, designs, devices or forms of advertisements hereunder of the necessity of renewal within the year next preceding the expiration of the ten (10) years from the date of registration by writing to the last known address of the registrants.

Any registration in force on the date on which this act shall become effective shall expire ten (10) years from the date of the registration or of the last renewal thereof or one (1) year after the effective date of this act, whichever is later, and may be renewed by filing an application with the secretary of state on a form furnished by him and paying the aforementioned renewal fee therefor within six (6) months prior to the expiration of the registration.

All applications for renewals under this act, whether of registrations made under this act or of registrations effected under any prior act, shall include a statement that the mark is still in use in this state. The secretary of state shall within six (6) months after the effective date of this act notify all registrants of a label, term, design, device or form of advertisement, under previous acts of the date of expiration of such registration unless

renewed in accordance with the provisions of this act, by writing to the last known address of the registrants. [1897, p. 123, § 3; reen. 1899, p. 316, § 3; reen. R.C., § 1451; compiled and reen. C.L., § 1451; C.S., § 2316; I.C.A., § 43-503; am. 1965, ch. 306, § 3, p. 818; am. 1984, ch. 56, § 6, p. 95.]

**Compiler's notes.** Sections 1 to 4 of S.L. 1984, ch. 56, were repealed by S.L. 1996, ch. 404, § 1.

**44-604. Penalty for fraudulent record.** — Any person who shall, for himself or on behalf of any other person, association or union, procure the filing of any label, term, design or form of advertisement, other than a trade-mark or a service mark, in the office of the secretary of state under the provisions of this chapter, by making any false or fraudulent representations or declarations, verbally or in writing or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such filing, to be recovered by, or on behalf of, the party injured thereby, in any court having jurisdiction, and shall be guilty of a misdemeanor, and be punished by a fine not exceeding \$100, or by imprisonment not exceeding three (3) months. [1897, p. 123, § 4; reen. 1899, p. 316, § 4; reen. R.C. & C.L., § 1452; C.S., § 2317; I.C.A., § 43-504; am. 1965, ch. 306, § 4, p. 818.]

**44-605. Injunction and damages for infringement.** — Every such person, association or union adopting or using a label, term, design, device or form of advertisement, other than a trade-mark or a service mark, as aforesaid, may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof, and all courts of competent jurisdiction shall grant injunctions to restrain such manufacture, and may award the complainant in any such suit damages resulting from such manufacture, use, sale or display, as may be by the said court deemed just and reasonable, and shall require the defendants to pay to such persons, association or union, all profits derived from such wrongful manufacture, use, display or sale; and such court shall also order that all such counterfeits or imitations in the possession or under the control of any defendant in such cause be delivered to an officer of the court or to the complainant to be destroyed. [1897, p. 123, § 5; reen. 1899, p. 316, § 5; reen. R.C. & C.L., § 1453; C.S., § 2318; I.C.A., § 43-505; am. 1965, ch. 306, § 5, p. 818.]

#### ANALYSIS

Complaints showing deceptive use of name.  
Geographical terms or names.  
Secondary meaning.  
Unfair competition as a fraud.

#### Complaints Showing Deceptive Use of Name.

Where a complaint alleged that the name "United American Benefit Association, Inc." used by defendant was deceptively similar to the name "American Home Benefit Association, Inc." used by the plaintiff, and that the general public had been misled and deceived by such deceptive similarity in names and

that embarrassment, inconvenience and damage had been suffered by plaintiff as a result thereof, the complaint was not demurrable on the ground that plaintiff could not claim exclusive right to the use of the word "American" for the reason that it was broadly geographical. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

#### Geographical Terms or Names.

The use of geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another, and to carry on unfair competition, may be lawfully



enjoined by a court of equity to the same extent as the use of any other terms or symbols. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

Geographical terms and words descriptive of the character, quality, or places of manufacture or of sale of articles cannot be monopolized as trade-marks. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

#### **Secondary Meaning.**

If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a sec-

ondary meaning, so as to indicate his goods or business and his alone, he is entitled to relief against another's deceptive use of such terms. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

#### **Unfair Competition as a Fraud.**

The sale of goods of one manufacturer or vendor as those of another is unfair competition, and constitutes a fraud which a court of equity may lawfully prevent by injunction. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

**44-606. Penalty for unauthorized use of label.** — Every person who shall use or display the genuine label, term, design, device or form of advertisement, other than a trade-mark or a service mark, of any such person, association or union, in any manner, not being authorized so to do by such person, union or association, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for not more than three (3) months or by fine of not more than \$100. In all cases where such association or union is not incorporated, suits under this chapter may be commenced and prosecuted by an officer or members of such association or union on behalf of, and for the use of, such association or union. [1897, p. 123, § 6; reen. 1899, p. 316, § 6; R.C. & C.L., § 1454; C.S., § 2319; I.C.A., § 43-506; am. 1965, ch. 306, § 6, p. 818.]

**Compiler's notes.** Section 7 of S.L. 1965, ch. 306 declared an emergency. Approved March 29, 1965.

**44-607. Penalty for unauthorized use of name.** — Any person or persons who shall in any way use the name or seal of any such person, association or union, or officer thereof, in and about the sale of goods or otherwise, not being authorized so to use the same, shall be guilty of a misdemeanor, and shall be punishable by imprisonment for not more than three (3) months, or by a fine of not more than \$100. [1897, p. 123, § 7; reen. 1899, p. 316, § 7; reen. R.C. & C.L., § 1455; C.S., § 2320; I.C.A., § 43-507.]

## **CHAPTER 7**

### **INJUNCTIVE RELIEF IN LABOR DISPUTES**

#### **SECTION.**

**44-701. Declaration of policy** — Collective bargaining.

**44-702. Contracts between individual employee and employer for or against union membership barred.**

**44-703. Injunctions** — Restrictions on issuance.

**44-704. Immunity from civil or criminal liability** — Labor disputes.

#### **SECTION.**

**44-705. Injunctions** — Declaration of policy.

**44-706. Injunctions** — Grounds — Hearing required — Bond.

**44-707. Plaintiff failing to comply with law or bargain in good faith** — Injunction refused.

**44-708. Injunctions** — Findings of fact — Scope of order.

**44-709. Review of orders granting or refusing injunction.**

## SECTION.

44-710. Criminal contempt charged — Rights of accused.

44-711. Punishment for contempt.

## SECTION.

44-712. Labor dispute defined.

44-713. Separability.

**44-701. Declaration of policy — Collective bargaining.** — In the interpretation and application of this act, the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. [1933, ch. 215, § 1, p. 452.]

**Compiler's notes.** The words "this act" refer to S. L. 1933, ch. 215 compiled as §§ 44-701 — 44-713.

**Cited in:** C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council, 77 Idaho 514, 297 P.2d 519 (1956), rev'd in Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co., 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956); Watson v. Idaho Falls Consol. Hosps., 111 Idaho 44, 720 P.2d 632 (1986).

## ANALYSIS

Elections.

Ex parte review of injunction, labor dispute.

Norris-LaGuardia Act same.

Public employers.

Suspension of union membership.

Union membership contract.

**Elections.**

The mandatory requirements of § 44-107 (now § 72-1382) providing for election rendered the rule by which the director attempted to defeat the holding of an election until after the year had elapsed subsequent to the holding of an initial election, not authorized, beyond his authority and void when a question arose concerning representation of employees in a collective bargaining unit. *Pumice Prods., Inc. v. Robison*, 79 Idaho 144, 312 P.2d 1026 (1957).

The holding of the election as requested and demanded is conformable to the declaration of policy of the labor act as set forth in this section where employees sought to revoke the

authority of a union, after having voted to have a union represent them as a bargaining agent, but no working agreement was ever reached. *Pumice Prods., Inc. v. Robison*, 79 Idaho 144, 312 P.2d 1026 (1957).

**Ex Parte Review of Injunction, Labor Dispute.**

The Supreme Court will not review a temporary injunction, ex parte upon affidavits, in the absence of a certificate by the trial judge to the fact that the action involves a labor dispute. *Boise Grocery Co. v. Stevenson*, 58 Idaho 344, 73 P.2d 947 (1937).

**Norris-LaGuardia Act Same.**

This is identical with the federal statute known as Norris-LaGuardia Anti-Injunction Act, 29 U.S.C. § 101 et seq. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**Public Employers.**

Sections 44-701 through 44-712 are directed to activities in the private sector and would not apply to a dispute between a public school district and a teachers' association. *School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n*, 98 Idaho 486, 567 P.2d 830 (1977).

**Suspension of Union Membership.**

The Supreme Court held that under the rule in the *Gonzales* case (356 U.S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018), the district court had jurisdiction over action brought by plain-



tiff to recover judgment for compensatory and punitive damages against defendant labor union for wrongful suspension of plaintiff's membership, such jurisdiction not having been preempted by the Labor Relations Act of 1947. *Lockridge v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am.*, 84 Idaho 201, 369 P.2d 1006 (1962).

#### **Union Membership Contract.**

Unincorporated associations, including la-

bor unions, are recognized as legal entities under the laws of this state. Therefore, the constitution and by-laws of defendant labor union and the granting and acceptance of membership constitute a contract between the plaintiff employee member and the defendant union. *Lockridge v. Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am.*, 84 Idaho 201, 369 P.2d 1006 (1962).

**44-702. Contracts between individual employee and employer for or against union membership barred.** — Every undertaking or promise hereafter made, whether written or oral, express or implied, between any employee or prospective employee and his employer, prospective employer or any other individual, firm, company, association, or corporation, whereby

(a) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or organizations or to join or to remain a member of some specific employer organization or any employer organization or organizations; and or

(b) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations and or

(c) Either party thereto undertakes or promises that he will withdraw from any employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations,

Is hereby declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat therefor, either party thereto to act in disregard of such undertaking or promise. [1933, ch. 215, § 2, p. 452.]

**Collateral References.** 48 Am. Jur. 2d, Labor and Labor Relations, §§ 667-671.  
51 C.J.S., Labor Relations, §§ 217-227.

Validity of stipulation in contract of employ-

ment against connection with labor union, and power of legislature to prohibit such contract. 68 A.L.R. 1267.

**44-703. Injunctions — Restrictions on issuance.** — No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement to do such work or to remain in such employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 44-702;

(c) Paying or giving to, or withholding from, any person any strike or unemployment benefits of insurance or other moneys or things of value;

(d) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or employ any person or persons;

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 44-702; and

(k) Doing in concert of any or all the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy. [1933, ch. 215, § 3, p. 452.]

**Sec. to sec. ref.** This section is referred to in § 44-706.

**Cited in:** Poffenroth v. Culinary Workers Union Local No. 328, 71 Idaho 412, 232 P.2d 968 (1951); Twin Falls Constr. Co. v. Operating Eng'rs Local No. 370, 95 Idaho 370, 509 P.2d 788 (1973).

#### ANALYSIS

"Dispute" defined.

Injunction against picketing.  
Jurisdiction of district court.

#### "Dispute" Defined.

The "dispute" referred to in subdivision (e) of this section means a labor dispute as defined in § 44-712, and not a dispute foreign to the relationship. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

#### Injunction Against Picketing.

Labor union was not deprived of freedom of speech, right of assembly, or due process of law contrary to constitutional provisions where it was enjoined from picketing and displaying sign which announced that plaintiff's store was unfair to labor union where the employees of the store did not belong to the union, did not participate in picket line, and were not involved in any labor dispute with the plaintiff. *J.J. Newberry Co. v. Retail Clerks Int'l Ass'n*, 78 Idaho 85, 298 P.2d 375 (1956).

State court had jurisdiction of proceedings by corporation and construction company to enjoin picketing of corporation plant by union representing employees of construction company where picketing was due to the fact that employees of corporation were fabricating tanks being installed by construction company, since no labor dispute was involved. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch*,



Inc., 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

#### **Jurisdiction of District Court.**

State district court had jurisdiction to enjoin union from picketing of plaintiff's store where employees of the store were not members of the union and were not engaged in any wage dispute with the plaintiff, since there was no labor dispute between plaintiff and its employees within the meaning of that term as defined in § 44-712. *J.J. Newberry Co. v. Retail Clerks Int'l Ass'n*, 78 Idaho 85, 298 P.2d 375 (1956).

**Collateral References.** Injunctive relief against boycott in industrial disputes. 6 A.L.R. 909; 16 A.L.R. 230; 27 A.L.R. 651; 32 A.L.R. 779; 35 A.L.R. 460; 116 A.L.R. 484.

Statutes restricting use of injunction in industrial disputes. 27 A.L.R. 411; 35 A.L.R. 460; 97 A.L.R. 1333; 106 A.L.R. 361; 120

A.L.R. 316; 124 A.L.R. 751; 127 A.L.R. 868.

Anti-injunction statutes, dispute between members of labor organization as labor dispute within. 138 A.L.R. 287; 170 A.L.R. 1096.

Norris-LaGuardia Act and similar state anti-injunction acts, as procedural or substantive in nature. 146 A.L.R. 1245.

Specific performance or injunction as proper remedy for breach of collective bargaining agreement. 156 A.L.R. 652.

Controversy between labor union and members or subordinate groups thereof as labor dispute within anti-injunction statute. 160 A.L.R. 544.

Employer's right to injunction against picketing by labor union to enforce a demand, compliance with which would constitute unfair labor practice. 162 A.L.R. 1438.

What amounts to seizure and holding of employer's plant equipment, machinery, or other property within statutory exception to inhibition on injunctions in labor disputes. 163 A.L.R. 668.

**44-704. Immunity from civil or criminal liability — Labor disputes.** — No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization. [1933, ch. 215, § 4, p. 452.]

**Collateral References.** Liability of labor union or its membership for torts committed by officers, members, pickets, or others, in

connection with lawful primary labor activities. 36 A.L.R.3d 405; 85 A.L.R.4th 979.

**44-705. Injunctions — Declaration of policy.** — In the interpretation and application of sections 44-706 — 44-709, inclusive, the public policy of this state is declared as follows:

Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for the reasons that

(1) The status quo cannot be maintained but is necessarily altered by the injunction,

(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the

circumstances, untrustworthy rather than from oral examination in open court is subject to grave error,

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party, and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case. [1933, ch. 215, § 5, p. 452.]

#### **Jurisdiction of State Court.**

State court had jurisdiction of proceedings by corporation and construction company to enjoin picketing of corporation plant by union representing employees of construction company where picketing was due to the fact that employees of corporation were fabricating tanks being installed by construction company, since no labor dispute was involved. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352

U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

**Collateral References.** 48A Am. Jur. 2d, Labor and Labor Relations, §§ 3631-3807.

43A C.J.S., Injunctions, §§ 143, 149, 150, 157.

State's power to enjoin violation of collective labor contract as affected by federal labor relations acts. 32 A.L.R.2d 829.

#### **44-706. Injunctions — Grounds — Hearing required — Bond. —**

No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof;

(a) That unlawful acts have been threatened or committed, and will be executed or continued unless restrained;

(b) That substantial or irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That no item of relief granted is relief that a court or judge thereof has no jurisdiction to restrain or enjoin under section 44-703;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property: provided, however, that

If a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than forty-eight (48) hours.



Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and the restraining order shall issue only upon testimony, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided.

Such a temporary restraining order shall be effective for no longer than five (5) days, and at the expiration of five (5) days shall become void and not subject to renewal or extension, provided however that if the hearing for a temporary injunction shall have been begun before the expiration of the said five (5) days the restraining order may, in the court's discretion be continued until a decision is reached upon the issuance of the temporary injunction.

No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. [1933, ch. 215, § 6, p. 452.]

**Compiler's notes.** The words in parentheses so appeared in the law as enacted.

**Cited in:** Poffenroth v. Culinary Workers Union Local No. 328, 71 Idaho 412, 232 P.2d 968 (1951).

#### ANALYSIS

**Complaint in labor dispute, sufficiency.**

**Evidence — picketing in injunction suit.**

**Labor dispute, what constitutes.**

**Operation of "courtesy cars" by striking employees enjoined.**

**What is labor union.**

**Complaint in Labor Dispute, Sufficiency.**

The fact that a complaint, otherwise involving a labor dispute, failed to charge that the public officers, whose duty it was to protect the company's property, were unable or failed to do so does not operate to deprive the court of jurisdiction to grant an injunction where the complaint and proof otherwise showed it to be entitled thereto; and this is true notwithstanding the fact that the existence of a labor dispute was disclosed by the employees'

answer. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**Evidence — Picketing in Injunction Suit.**

Where the only testimony tending to show that certain defendants participated in the acts complained of in a labor dispute between a street car company and its employees was based on hearsay, it did not constitute proof of the facts sought to be established and it was error to include the names of such employees in the judgment based on decree of such evidence. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940). However, see *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941); 132 A.L.R. 1200, 371 Ill. 377, 21 N.E.2d 308.

**Labor Dispute, What Constitutes.**

After a contract between the employer and an association of employees was canceled and the employer discharged eight of the employees, a strike resulted therefrom, this constituted a labor dispute within the meaning of the statute, requiring findings of fact before

the employer could obtain injunctive relief. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**Operation of "Courtesy Cars" by Striking Employees Enjoined.**

Where there is a strike by street car company employees, tying up the street car company's operations, and the employees attempt to operate so-called "courtesy cars" over the same routes that the street car company had theretofore operated its cars, for which no charge was made but contributions were invited in receptacles placed in such courtesy cars, that is sufficient to warrant the court in granting injunctive relief to protect the street car company's franchise; but the injunction will be strictly construed to avoid invasion of the rights of the employees' lawful use of streets for the purpose of publicizing the issues involved in the labor dispute. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**What Is Labor Union.**

The fact that the employer's attorney assists the men in drawing up articles perfecting their organization, if he acts in good faith toward the employees, does not disqualify the association from being a labor union within the meaning of the statute. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

The fact that a member of an association made a motion for an increase of wages, which was seconded and was not put to a vote, cannot be relied on by the employer to show that the association was not a legitimate labor union, organized and operated in the interest of its members. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**Collateral References.** Use of injunction as proper remedy for a breach of collective bargaining agreement. 156 A.L.R. 652.

**44-707. Plaintiff failing to comply with law or bargain in good faith — Injunction refused.** — No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make very [every] reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation of voluntary arbitration, but nothing herein contained shall be deemed to require the court to await the action of such tribunal if irreparable injury is threatened. [1933, ch. 215, § 7, p. 452.]

**Compiler's notes.** The bracketed word "every" was inserted by the compiler.

**Sec. to sec. ref.** This section is referred to in § 44-705.

**44-708. Injunctions — Findings of fact — Scope of order.** — No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; and shall be binding only upon the parties to the suit, their agents, servants, employees and attorneys, or those in active concert and participation with them, and who shall by personal service or otherwise have received actual notice of the same. [1933, ch. 215, § 8, p. 452.]

**Sec. to sec. ref.** This section is referred to in § 44-705.



**Injunction in Labor Dispute.**

Before any acts can be enjoined in a labor dispute under this and cognate sections of the statute, it should appear that such acts were set forth in the complaint and in the findings of fact, and where no reference was made in the complaint or findings, to picketing or acts

of violence, or threatened violence or intimidation, and there was no evidence to support the portions of the decree relating thereto, the inclusion in the decree of the portions referring to such acts was erroneous. *Boise St. Car Co. v. Van Avery*, 61 Idaho 502, 103 P.2d 1107 (1940).

**44-709. Review of orders granting or refusing injunction. —** Whenever any court or judge or judges thereof shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs, forthwith certify the entire record of the case, including a transcript of the evidence taken, to the appropriate appellate court for its review. Upon the filing of such record in the appropriate appellate court the appeal shall be heard with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character. [1933, ch. 215, § 9, p. 452.]

**Sec. to sec. ref.** This section is referred to in § 44-705.

**44-710. Criminal contempt charged — Rights of accused. —** In all cases where a person shall be charged with direct criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy,

(a) The rights as to admission to bail that are accorded to persons accused of crime.

(b) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court,

(c) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court, and

(d) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred otherwise than in open court. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated by the presiding judge of said court. The demand shall be filed prior to the hearing in the contempt proceeding. [1933, ch. 215, § 10, p. 452.]

**44-711. Punishment for contempt. —** Punishment for a contempt, specified in section 44-710, may be by fine, not exceeding one hundred dollars (\$100), or by imprisonment not exceeding fifteen (15) days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he

must be discharged at the expiration of fifteen (15) days; but where he is also committed for a definite time, the fifteen (15) days must be computed from the expiration of the definite time. [1933, ch. 215, § 11, p. 452.]

**44-712. Labor dispute defined.** — The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. [1933, ch. 215, § 12, p. 452; am. 1947, ch. 266, § 1, p. 789.]

**Cited in:** *Twin Falls Constr. Co. v. Operating Eng'rs Local No. 370*, 95 Idaho 370, 509 P.2d 788 (1973).

#### ANALYSIS

Application of section.

Constitutionality.

"Dispute" construed.

Existence of labor dispute.

#### Application of Section.

This section could not be applied, in action for damages against labor organization for alleged contractual interference, to establish that picketing complained of was unlawful; neither could this section be construed to supplement plaintiffs' alleged right to damages under § 8(b)(4) of the National Labor Relations Act. *Simpkins v. Southwestern Idaho Painters Dist. Council No. 57*, 95 Idaho 165, 505 P.2d 313 (1973).

#### Constitutionality.

Union enjoined from picketing boarding house of plaintiffs could not attack constitutionality of this section based upon discrimination against minority of employees where employees affected did not belong to the union and did not join in attack on constitutionality. *Poffenroth v. Culinary Workers Union Local No. 328*, 71 Idaho 412, 232 P.2d 968 (1951).

The contention by a union that this section is unconstitutional on the ground that the law fails to protect minorities could not be upheld where the union involved did not represent any of the employees involved in the dispute. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of

national labor relations board in first instance.

#### "Dispute" Construed.

The dispute referred to in subdivision (e) of § 44-703 means a labor dispute as defined in this section, and not a dispute foreign to the relationship. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

#### Existence of Labor Dispute.

Where the majority of the employees of a store withdrew from union membership and the union thereupon disclaimed any right to represent the employees of the store as bargaining agent, but picketed the store as being "non-union," before trying an action by the employer to enjoin picketing and for damages, the district court should petition the national labor relations board for an advisory opinion as to whether it would accept or decline jurisdiction. *Cox's Food Ctr., Inc. v. Retail Clerks Union, Local No. 1653*, 91 Idaho 274, 420 P.2d 645 (1966).

**Collateral References.** Construction and application of provisions of unemployment compensation or social security acts regarding disqualification for benefits because of labor disputes or strikes. 28 A.L.R.2d 287; 60 A.L.R.3d 11; 61 A.L.R.3d 693; 61 A.L.R.3d 746; 62 A.L.R.3d 314; 62 A.L.R.3d 380; 62 A.L.R.3d 437.

General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute. 63 A.L.R.3d 88.

**44-713. Separability.** — If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act and the application of such provisions to other persons or circumstances shall not be affected thereby. [1933, ch. 215, § 13, p. 452.]



**Compiler's notes.** For words "this act" see Compiler's notes, § 44-701.

Section 14 of S.L. 1933, ch. 215 repealed all acts and parts of acts in conflict therewith.

## CHAPTER 8

### SECONDARY BOYCOTT ACT

#### SECTION.

44-801. Secondary boycott.  
44-802. Penalty.

#### SECTION.

44-803. Short title.

**44-801. Secondary boycott.** — It shall be unlawful to cause or threaten to cause, and/or combine or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands. [1947, ch. 265, § 1, p. 788.]

**Cited in:** *Simpkins v. Southwestern Idaho Painters Dist. Council* No. 57, 95 Idaho 165, 505 P.2d 313 (1973).

#### ANALYSIS

**Constitutional guaranties.**  
**Injunction against.**

#### **Constitutional Guaranties.**

Freedom of speech and press guaranteed by the state and federal constitution did not protect a labor union where its activities resulted in a secondary boycott. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

#### **Injunction Against.**

Union which represented employees of a construction company was guilty of engaging in a secondary boycott where it established a picket line at entrance to a corporation plant where construction company was engaged on a job because employees of the corporation who belonged to another union were doing

fabrication work on a tank being installed by the construction company, and such picketing could be enjoined. *C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council*, 77 Idaho 514, 297 P.2d 519, rev'd in *Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956), on authority of *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546 (1955), holding dispute within jurisdiction of national labor relations board in first instance.

**Collateral References.** 48 Am. Jur. 2d, Labor and Labor Relations, §§ 2482-2486.

51 C.J.S., Labor Relations, §§ 228, 250, 268.

Legality of notification of third persons not to deal with persons boycotted under penalty of losing patronage or having a strike called. 6 A.L.R. 909; 16 A.L.R. 230; 27 A.L.R. 651; 32 A.L.R. 779; 116 A.L.R. 484.

Meaning of the phrase "secondary boycott." 16 A.L.R. 196; 16 A.L.R. 222; 21 A.L.R. 531; 54 A.L.R. 791.

Validity and construction of § 303 of Labor Management Relations Act (29 U.S.C. § 187) giving right of action against union for inducing strikes and secondary boycotts. 7 A.L.R. Fed. 767.

Ally and single enterprise doctrine in secondary boycott cases. 13 A.L.R. Fed. 466.

**44-802. Penalty.** — Any person, firm, individual, corporation, labor organization or association of persons found guilty of committing, or causing

to be committed, any of the acts herein declared to be unlawful, shall be deemed guilty of misdemeanor. [1947, ch. 265, § 2, p. 788.]

**Cited in:** C.H. Elle Constr. Co. v. Pocatello Bldg. & Constr. Trades Council, 78 Idaho 1, 297 P.2d 519, rev'd in Pocatello Bldg. &

Constr. Trades Council v. C.H. Elle Constr. Co., 352 U.S. 884, 77 S. Ct. 130, 1 L. Ed. 2d 82 (1956).

**44-803. Short title.** — This act may be cited as "The Secondary Boycott Act." [1947, ch. 265, § 3, p. 788.]

**Compiler's notes.** The words "this act" refer to S.L. 1947, ch. 265 compiled as §§ 44-801 — 44-803.

## CHAPTER 9

### EMPLOYMENT CONTRACTS

#### SECTION.

44-901. Anti-union contracts prohibited.

44-902. Contracts restricting board and lodging prohibited.

#### SECTION.

44-903. Polygraph tests prohibited.

44-904. Polygraph tests — Exclusions.

**44-901. Anti-union contracts prohibited.** — It shall be unlawful for any person, firm or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employee of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization. Any person or persons or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars (\$50.00) nor more than \$300.00, or be imprisoned in the county jail for not more than six (6) months, or shall be punished by both such fine and imprisonment. [1893, p. 152, §§ 1, 2; reen. 1899, p. 221, §§ 1, 2; am. R.C., § 1456; reen. C.L., § 1456; C.S., § 2321; I.C.A., § 43-601.]

**Cross ref.** Collective bargaining, § 44-701.

**Collateral References.** 48 Am. Jur. 2d, Labor and Labor Relations, §§ 667-671, 870, 1414.

Validity of stipulation in contract of employment against connection with a labor union, and power of legislature to prohibit such contract. 68 A.L.R. 1267.

**44-902. Contracts restricting board and lodging prohibited.** — It shall be unlawful for any employer, by himself or by his agent, or for any agent of any employer, or for any other person, directly or indirectly, to impose as a condition, express or implied, in or for the employment of any workman or employee, any terms as to the place at which, or the person with whom any workman or employee is to board, lodge, subsist or reside; or as to the place or store at which he shall purchase his goods, wares or merchandise; or as to the place at which, or the manner in which, or the person with whom any wages or portion of wages paid to the workman or employee are or is to be expended; and no employer shall, by himself or his agent, nor shall any agent of any employer dismiss any workman or



employee from his employment for or on account of the place at which, or the person with whom such workmen or employee may board, lodge, subsist or reside; or as to the place or store at which he shall purchase his goods, wares and merchandise; or for or on account of the place at which, or the person with whom any wages or portion of wages paid by the employer to such workman or employee are or is expended, or fail to be expended: provided, that this shall not apply to the collection of hospital fees or dues.

Any employer, who by himself or by his agent, or any agent of any employer, or any other person, who shall violate any of the provisions of this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$100 nor to exceed \$300, or be imprisoned in the county jail for not less than thirty (30) days nor to exceed ninety (90) days, or shall suffer both such fine and imprisonment. [1911, ch. 123, §§ 1, 2, p. 385; reen. C.L., § 1456a; C.S., § 2322; I.C.A., § 43-602.]

**44-903. Polygraph tests prohibited.** — No person, firm, corporation or other business entity or representative thereof, shall require as a condition for employment or continuation of employment any person or employee to take a polygraph test or any form of a so-called lie detector test. A violation of this section shall constitute a misdemeanor. [1973, ch. 279, § 1, p. 594.]

**Collateral References.** Employer's interrogation of employees concerning matters alleged in an unfair labor practice complaint, as unfair labor practice. 4 A.L.R. Fed. 280.

**44-904. Polygraph tests — Exclusions.** — The provisions of this act shall not apply to any law enforcement agency of the United States of America, the state of Idaho, or any political subdivision or governmental entity thereof. [1973, ch. 279, § 2, p. 594.]

**Compiler's notes.** The words "this act" refer to S.L. 1973, ch. 279, compiled as §§ 44-903, 44-904.

## CHAPTER 10

### PUBLIC WORKS

#### SECTION.

44-1001. Employment of residents of Idaho — Wage scale — Federal funds.

44-1002. Terms of employment and wage contracts.

44-1003. Definitions of terms used.

#### SECTION.

44-1004. Penalty for violating law.

44-1005. Employment of aliens on public works prohibited — Exception.

44-1006. [Repealed.]

**44-1001. Employment of residents of Idaho — Wage scale — Federal funds.** — In all state, county, municipal, and school construction, repair, and maintenance work under any of the laws of this state the contractor, or person in charge thereof must employ ninety-five percent (95%) bona fide Idaho residents as employees on any such contracts except where under such contracts fifty (50) or less persons are employed the contractor may employ ten percent (10%) nonresidents, provided however,

in all cases such employers must give preference to the employment of bona fide Idaho residents in the performance of such work; provided, that in work involving the expenditure of federal aid funds this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged soldiers, sailors, and marines, prohibiting as unlawful any other preference or discrimination among the citizens of the United States. [1933, ch. 111, § 1, as added by 1935, ch. 140, § 1, p. 346; am. 1939, ch. 33, § 1, p. 70; am. 1985, ch. 3, § 1, p. 7.]

**Compiler's notes.** The words "this act" refer to S.L. 1933, ch. 111 which, as amended, is compiled as §§ 44-1001 — 44-1004.

S.L. 1935, ch. 140, p. 346 purported to amend S.L. 1933, ch. 111 in its entirety. In so doing, it inserted an entirely new section and numbered it § 1. It then reenacted § 1 of the 1933 act but numbered it § 2.

Former § 2 of the 1933 act was reenacted but was renumbered as § 3.

Former § 3 of the 1933 act was amended by deleting a provision for the retention of \$500 as liquidated damages for the violation of the

terms of the contract and made failure to comply with the act a misdemeanor. Former § 3 was renumbered as § 4.

Former § 4 of the 1933 act was reenacted and renumbered as § 5.

Former § 5 of the 1933 act was reenacted and renumbered as § 6. It repealed all conflicting laws.

Former § 6 of the 1933 act was reenacted and renumbered as § 7. It declared an emergency.

All these changes were made by § 1 of the 1935 act.

**44-1002. Terms of employment and wage contracts.** — In all contracts hereafter let for state, county, municipal, and school construction, repair, and maintenance work under any of the laws of this state there shall be inserted in each of said contracts a provision by which the contractor must employ ninety-five percent (95%) bona fide Idaho residents as employees on any job under any such contract except where under such contracts fifty (50) or less persons are employed the contractor may employ ten percent (10%) nonresidents, provided, however, in all cases employers must give preference to the employment of bona fide residents in the performance of said work, and no contract shall be let to any person, firm, association, or corporation refusing to execute an agreement with the above mentioned provisions in it; provided, that, in contracts involving the expenditure of federal aid funds this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged soldiers, sailors, and marines, prohibiting as unlawful any other preference or discrimination among citizens of the United States. [1933, ch. 111, § 1 [2], p. 176; reen. 1935, ch. 140, § 1, p. 346; am. 1939, ch. 33, § 2, p. 70; am. 1985, ch. 3, § 2, p. 7.]

**Compiler's notes.** The title of the 1939 act does not make reference to § 2.

For words "this act" see Compiler's notes, § 44-1001.

Section 4 of S.L. 1985, ch. 3 declared an emergency. Became law without governor's signature, February 11, 1985.

**Collateral References.** 64 Am. Jur. 2d,

Public Works and Contracts, §§ 216-235.

51B C.J.S., Labor Relations, §§ 1039, 1240-1247.

Validity of statute, ordinance, or charter provision requiring that workmen on public works be paid the prevailing or current rate of wages. 18 A.L.R.3d 944.



**44-1003. Definitions of terms used.** — Labor is hereby defined to be all services performed in the construction, repair, or maintenance of all state, county, municipal, and school work.

A bona fide resident of Idaho is hereby declared to be a person, who, at the time of his said employment and immediately prior thereto, has resided in this state for not less than one (1) year. [1933, ch. 111, § 2 [3], p. 176; reen. 1935, ch. 140, § 1, p. 346; am. 1939, ch. 33, § 3, p. 70.]

**Compiler's notes.** The title of the 1939 act does not refer to this section in the title, although it was so amended in the body of the act.

**44-1004. Penalty for violating law.** — If any person, firm or corporation shall fail to comply with the provisions of this act he shall be guilty of a misdemeanor. [1933, ch. 111, § 3 [4], p. 176; am. 1935, ch. 140, § 1, p. 346.]

**Compiler's notes.** For words "this act" see Compiler's notes, § 44-1001.

Session Laws 1933, ch. 111, § 4[5], 1935, ch. 140, § 1, and 1939, ch. 33, § 4 each carried the following separability clause: "If any part of this act shall be held to be unconstitutional such decision shall not affect the validity of any other provisions of this act." Said section is applicable to sections 44-1001 — 44-1004.

Session Laws 1933, ch. 111, § 5[6], and 1935, ch. 140, § 1, repealed all conflicting laws.

Session Laws 1933, ch. 111, § 6[7]; 1935, ch. 140, § 1 and 1939, ch. 33, § 5, each declared an emergency.

**Cross ref.** Penalty on conviction of a misdemeanor when not otherwise provided for, § 18-113.

**44-1005. Employment of aliens on public works prohibited — Exception.** — No person not a citizen of the United States, or who has not declared his intention to become such, or who is not eligible to become such, shall be employed upon any state or municipal works; nor shall any such person be employed by any contractor to work on any public works of the state or any municipality: provided, that any state prisoner may be employed within the state prison grounds and as provided in section 3, article 13, of the constitution. Any person who shall violate any of the provisions of this section, on conviction thereof, shall be punished by a fine of not less than ten dollars (\$10.00) nor more than \$100 for each person so employed, or by imprisonment in the county jail until such fine be paid or until discharged as provided by law. [1890-1891, p. 233, §§ 1, 2; reen. 1899, p. 70, §§ 3, 4; reen. R.C. & C.L., § 1457; C.S., § 2323; I.C.A., § 43-603.]

**Compiler's notes.** Compiled Laws contained this note: "In the opinion of the commissioner this section is unconstitutional under Re Case (1911), 20 Idaho 128, 116 P. 1037, but that case mentions only R.C., § 1458, which was originally enacted S.L. 1897, p. 5, § 1. R.C., §§ 1459-1460, which were §§ 2 and 3 respectively of the act of 1897, necessarily fall with § 1458. Section 1457 was a reenactment of S.L. 1890-1891, p. 233, upon the validity of which the court did not pass. Inasmuch as there is still a question as to whether that portion of § 1457 relating to the employment directly by the state is valid, it is

deemed proper to retain it in this compilation."

Constitution, Article 13, § 3 referred to in the first sentence of this section was repealed.

**Cross ref.** Aliens not to be employed on public work, Const., Art. 13, § 5.

**Collateral References.** 65 Am. Jur. 2d, Public Works and Contracts, § 202.

18 C.J.S., Convicts, § 13; 51 C.J.S., Labor Relations, § 4.

Constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works. 38 A.L.R.3d 1213.

**44-1006. Determining prevailing wages as paid in county seat of county in which work is being performed. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 44-1006 as added by 1955, ch. 53, § 1, p. 77; am. 1965, ch. 202, § 1, p. 455; am. 1974, ch. 39, § 60, p. 1023, was repealed by S.L. 1985, ch. 3, § 3.

**CHAPTER 11**

**DAYS WORK**

**SECTION.**

44-1101 — 44-1109. [Repealed.]

**44-1101 — 44-1103. Public work — Contracts — Eight hour day — Exceptions — Wage rate — Penalty for false certificate. [Repealed.]**

**Compiler's notes.** These sections, which comprised 1899, §§ 1, 2, p. 113; reen. R.C., §§ 1451, 1462; 1911, ch. 131, §§ 1-3, pp. 417, 418; am. 1913, ch. 165, §§ 1, 2, pp. 533, 534; reen. C.L., §§ 1461, 1462, 1462a; C.S., §§ 2324-2326; am. 1923, ch. 93, § 1, p. 111; I.C.A., §§ 43-701 — 43-703, were repealed by S.L. 1985, ch. 3, § 3.

**44-1104 — 44-1107. Mines — Smelters — Eight hours a day's work — Penalty for violating act — Female employees. [Repealed.]**

**Compiler's notes.** The following sections were repealed by S.L. 1996, ch. 123, § 1, effective March 8, 1996:

44-1104. (1907, p. 97, § 1; reen. R.C. & C.L. § 1463; C.S. § 2327; am. 1935, ch. 74, § 1, p. 129; I.C.A., § 43-704; am. 1985, ch. 245, § 1, p. 576; am. 1994, ch. 367, § 1, p. 1179).

44-1105. (1907, p. 97, § 2; reen. R.C. § 1464; am. 1909, p. 4, § 1; reen. C.L., § 1464; C.S., § 2328; I.C.A., § 43-705; am. 1985, ch. 245, § 2, p. 576).

44-1106. (1907, p. 97, § 3; reen. R.C. & C.L., § 1465; C.S., § 2329; I.C.A., § 43-706).

44-1107. (1913, ch. 86, § 1, p. 360; compiled and reen. C.L., § 1466; C.S., § 2330; I.C.A., § 43-707; am. 1963, ch. 281, § 1, p. 724) previously superseded by §§ 18-7303, 44-1703, and 67-5909, on authority of Idaho Trailer Coach Ass'n v. Brown, 95 Idaho 910, 523 P.2d 42 (1974).

**44-1108, 44-1109. Female employees — Seats to be furnished — Act to be posted — Penalty for violation. [Repealed.]**

**Compiler's notes.** These sections, which comprised 1918, ch. 86, §§ 2, 3, p. 360; reen. C.L., §§ 1467, 1468; C.S., §§ 2231, 2232; I.C.A., §§ 43-708, 43-709, were repealed by S.L. 1985, ch. 245, § 3.

**CHAPTER 12**

**HOURS WORKED ACT**

**SECTION.**

44-1201. Declaration of state policy.  
44-1202. Hours of work and compensable time — Determination.

**SECTION.**

44-1203. Compensable pay provisions unaffected.  
44-1204. Short title.

**44-1201. Declaration of state policy. —** As a guide to the interpretation and application of this act the public policy of this state is declared to



be as follows: The financial and economic stability of the state of Idaho and its citizens is threatened by the filing of, and threats to file, lawsuits to recover for nonproductive labor performed during the war, which is a serious menace to the health, morals, and welfare of the people of this state and is a sufficient basis for invoking the police power of the state; that it is contrary to the public policy of the state of Idaho for persons now to sue for attorneys' fees, liquidated damages, and alleged overtime for nonproductive work performed during the war; that it is the policy of this state that when persons have once agreed to what constitutes compensable time spent in employment and employers have paid the same and employees have accepted payment on the basis of the agreement, that such agreement, payments and acceptance should be accepted as final; that the prospect of large sums being recovered as attorneys' fees, liquidated damages, and unpaid overtime from employers who would then have claims against the state for income tax refunds, and the possible bankruptcy of many persons, firms and corporations, who, otherwise would pay to the state large sums as income and other excise taxes, threatens our social security payments, our educational expansion program, and endangers teachers salaries, workmen's compensation benefits, unemployment compensation benefits, and all the activities of the state, and would create a serious condition of unemployment, all to the irreparable damage and injury to all of our people; that this situation is so serious that the power inherent in the state to protect itself through its police power should be and hereby is invoked to limit and define what has and shall constitute hours worked in all suits and actions for attorneys' fees, liquidated damages, back wages, overtime pay, penalties and/or damages where wages and salaries have been paid and accepted. [1947, ch. 267, § 1, p. 789.]

**Compiler's notes.** The words "this act" refer to S.L. 1947, ch. 267 compiled as §§ 44-1201 — 44-1204.

**Collateral References.** What employers are within the provisions of hours of labor

statutes. 16 A.L.R. 537.

Constitutionality of statute limiting hours of labor in private industry. 90 A.L.R. 814.

Validity of minimum wage statutes relating to private employment. 39 A.L.R.2d 740.

#### **44-1202. Hours of work and compensable time — Determination.**

— In any and all suits, actions and court proceedings, whether now pending or hereafter instituted, for attorneys' fees, liquidated damages, back or unpaid wages, salaries or compensation for work or labor performed in Idaho, where wages or salaries have been paid to any employee for a pay period, and such employee claims additional salary, wages, overtime compensation, penalties, liquidated damages or attorneys' fees because of work done and services performed during his employment for the pay period covered by such payment, the following is and shall be the definition of "hours worked," and of time put in for which attorneys' fees, liquidated damages, back or unpaid wages, salaries, or compensation may be recovered:

In determining "hours worked" or compensable time for which recovery may be had in such actions for attorneys' fees, liquidated damages, back or unpaid wages, salaries or compensation, the following rules shall be applied:

(1) Wherever the custom or practice of a business, industry, plant, mine, factory or place of work has established the amount of noncompensable time to be spent by an employee in travelling to and from the place of work, in preparing for productive work, in changing clothes before and after a shift, taking showers, securing and returning tools and equipment, in no event shall time so spent be deemed, held or considered to be time or hours worked;

(2) Wherever time spent traveling to or from the place of work, and the preliminary preparation for productive work, and time spent after a regular shift in preparing to leave the place of work, has been taken into consideration in fixing the rate of pay, it shall not be deemed, held or considered to be time or hours worked;

(3) In no event shall any of the following be deemed, held or considered as time or hours worked:

- (a) Time spent before beginning of shift in checking in;
- (b) Time spent in going to or returning from lunch;
- (c) Time spent in change room, taking showers, changing clothes, securing tools and equipment;
- (d) Time spent before actual shift starts in receiving instructions;
- (e) Time spent on employers' property after end of shift;
- (f) Time spent after end of shift in returning tools and equipment, receiving or giving orders, and making reports;
- (g) Time spent in traveling to or from the place of work;
- (h) Time spent in waiting in line for payment of wages or salaries;
- (i) Time spent in any incidental activities before or after work, which may involve activities which are excluded from compensable work time by industry practice, custom or agreement. [1947, ch. 267, § 2, p. 789.]

#### **Accident While Driving to Work.**

Where at the time of the accident driver of automobile was neither an agent, employee nor servant of a specific company, but was merely driving toward a town in an effort to report for work and the use and operation of his automobile in that effort was entirely his choice and under his complete control, he was

not a person employed by another person who was responsible for his conduct within the wrongful death statute, the prospective employer not being liable for any negligence on the part of a driver while driving toward the place of intended employment. *Lallatin v. Terry*, 81 Idaho 238, 340 P.2d 112 (1959).

**44-1203. Compensable pay provisions unaffected.** — Nothing contained in this act shall be construed as preventing the recovery of any wages, salaries, overtime compensation, liquidated damages or attorneys' fees, where salaries or wages have not been paid for a pay period, nor as preventing an employer and an employee from agreeing in writing as to what shall constitute hours worked or time spent for which compensation shall be paid, and on which overtime compensation shall be paid. [1947, ch. 267, § 3, p. 789.]

**Compiler's notes.** For words "this act" see Compiler's notes, § 44-1201.

**44-1204. Short title.** — This act may be referred to as the "Idaho Hours Worked Act." [1947, ch. 267, § 4, p. 789.]



**Compiler's notes.** For words "this act" see Compiler's notes, § 44-1201.

Section 5 of S.L. 1947, ch. 267 declared an emergency. Approved Mar. 19, 1947.

## CHAPTER 13

### CHILD LABOR LAW

#### SECTION.

44-1301. Restrictions on employment of children under fourteen.

44-1302. Children under sixteen — Educational requirements.

44-1303. Employers to keep record of minor employees.

44-1304. Working hours for children under sixteen.

#### SECTION.

44-1305. Penalty for violations of chapter.

44-1306. Prohibition against theatrical employment of children — Penalty — Exception.

44-1307. Employment of minors in immoral surroundings.

44-1308. Probation officers and school trustees to bring complaint.

#### **44-1301. Restrictions on employment of children under fourteen.**

— No child under fourteen (14) years of age shall be employed, permitted or suffered to work in or in connection with any mine, factory, workshop, mercantile establishment, store, telegraph or telephone office, laundry, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages. It shall be unlawful for any person, firm or corporation to employ any child under fourteen (14) years of age in any business or service whatever during the hours in which the public schools of the district in which the child resides are in session, or before the hour of six o'clock in the morning, or after the hour or nine o'clock in the evening: provided, that any child over the age of twelve (12) years may be employed at any of the occupations mentioned in this chapter during the regular vacations of two (2) weeks or more of the public schools of the district in which such child resides. [1907, p. 248, § 1; am. R.C., § 1466; am. 1911, ch. 159, § 166, p. 483; am. C.L. 38:280; C.S., § 1024; I.C.A., § 43-801.]

**Cross ref.** Child labor in mines prohibited, Const., Art. 13, § 4.

**Sec. to sec. ref.** This section is referred to in §§ 44-1305 and 44-1308.

**Collateral References.** 51 C.J.S., Labor Relations, §§ 3, 4.

What is a manufacturing establishment within the meaning of child labor laws. 96 A.L.R. 1353.

Streets, constitutionality of statute or ordinance relating to child labor in. 152 A.L.R. 579.

#### **44-1302. Children under sixteen — Educational requirements. —**

No minor who is under sixteen (16) years of age shall be employed or permitted to work at any gainful occupation during the hours that the public schools of the school district in which he resides are in session, unless he can read at sight and write legibly simple sentences in the English language, and has received instructions in spelling, English grammar and geography and is familiar with the fundamental operations of arithmetic up to and including fractions, or has similar attainments in another language. [1907, p. 248, § 2; reen. R.C., § 1467; am. 1911, ch. 159, § 167, p. 483; reen. C.L. 38:281; C.S., § 1025; I.C.A., § 43-802.]

**Cross ref.** Compulsory education law, § 33-202 et seq.

**Sec. to sec. ref.** This section is referred to in § 44-1305.

**Collateral References.** Construction and application of statutes or ordinance relating to child labor in streets. 152 A.L.R. 579.

**44-1303. Employers to keep record of minor employees.** — Every person, firm, corporation, agent or officer of a firm or corporation employing or permitting minors under sixteen (16) years of age and over fourteen (14) years of age to work in any mine, factory, workshop, mercantile establishment, store, telegraph or telephone office, laundry, restaurant, hotel, apartment house, or in the distribution or transmission of merchandise or messages, shall keep a record of the names, ages, and place of residence of such minors. [1907, p. 248, § 3; reen. R.C., § 1468; am. 1911, ch. 159, § 168, p. 483; reen. C.L. 38:282; C.S., § 1026; I.C.A., § 43-803.]

**44-1304. Working hours for children under sixteen.** — No person under the age of sixteen (16) years shall be employed or suffered or permitted to work at any gainful occupation more than fifty-four (54) hours in any one week, nor more than nine (9) hours in any one day; nor before the hour of six o'clock in the morning nor after the hour of nine o'clock in the evening. [1907, p. 248, § 4; reen. R.C., § 1469; reen. 1911, ch. 159, § 169, p. 483; reen. C.L. 38:283; C.S., § 1027; I.C.A., § 43-804.]

#### ANALYSIS

Jurisdiction over claim for injuries.  
Protection of section.  
Relationship created.

aged 16 worked 12 hours on night shift, since this section protects only minors under 16. *Shirts v. Shultz*, 76 Idaho 463, 285 P.2d 479 (1955).

#### **Jurisdiction over Claim for Injuries.**

The industrial accident board had exclusive jurisdiction of claim for injuries sustained by a minor aged 15 while working for a lumber company. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

#### **Relationship Created.**

Employment of minor though in violation of the child labor law is not void, but creates the relationship of employer and employee under the workmen's compensation act pursuant to provisions of former § 72-1011. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

#### **Protection of Section.**

This section was not violated where minor

**44-1305. Penalty for violations of chapter.** — Whoever employs a child under sixteen (16) years of age, and whoever having under his control a child under such age permits such child to be employed in violation of sections 44-1301 and 44-1302 shall, for such offense, be fined not more than fifty dollars (\$50.00), and whoever continues to employ any child in the violation of either of said sections after being notified by a truant officer, probation officer or school authority shall, for every day thereafter that such employment continues, be fined not less than five dollars (\$5.00) nor more than twenty dollars (\$20.00). A failure to produce to a truant officer, policeman, probation officer or school authority, the age record required by this chapter shall be prima facie evidence of the illegal employment of any person whose age record is not produced. Any parent, guardian or custodian of a minor under sixteen (16) years of age who knowingly swears falsely as to the age of such child for the purpose of obtaining an age record is guilty of perjury. [1907, p. 248, § 5; reen. R.C., § 1470; reen. 1911, ch. 159, § 170, p. 483; reen. C.L. 38:284; C.S., § 1028; I.C.A., § 43-805.]



Cross ref. Punishment for perjury, § 18-5409.

**44-1306. Prohibition against theatrical employment of children — Penalty — Exception.** — Any person, whether as parent, relative, guardian, employer or otherwise, having the care, custody or control of any child under the age of sixteen (16) years, who exhibits, uses or employs in any manner or under any pretense, sells, apprentices, gives away, lets out or disposes of such child to any person, under any name, title or pretense, for or in any business, exhibition or vocation, injurious to the health or dangerous to the life or limb of such child, or in or for the vocation, occupation, service or purpose of singing, playing on musical instruments, rope or wire walking, dancing, begging or peddling, or as a gymnast, acrobat, or contortionist, or rider, or in any place whatsoever, or for any obscene, indecent or immoral purposes, exhibition or practice whatsoever, or for or in any mendicant, or wandering business whatsoever, or who causes, procures or encourages such child to engage therein, is guilty of a misdemeanor, and punishable by a fine of not less than fifty dollars (\$50.00) nor more than \$250, or by imprisonment in the county jail for a term not exceeding six (6) months or by both such fine and imprisonment. Every person who takes, receives, hires, employs, uses, exhibits, or has in custody any child under the age [of sixteen years] and for any of the purposes mentioned in this section is guilty of a like offense and punishable by like imprisonment. Nothing in this section contained applies to or affects the employment or use of any such child as a singer or musician in any church, school or academy, or the teaching or learning of the science or practice of music. [1907, p. 248, § 6; reen. R.C., § 1471; reen. 1911, ch. 159, § 171, p. 483; reen. C.L. 38:285; C.S., § 1029; I.C.A., § 43-806.]

**Compiler's notes.** The bracketed words "of sixteen years" were inserted by the compiler.

**Collateral References.** Constitutionality of child labor laws. 12 A.L.R. 1216; 21 A.L.R. 1437.

Construction and application of child labor laws as regards exhibitions or entertainments of children. 72 A.L.R. 141.

**44-1307. Employment of minors in immoral surroundings.** — Any person, whether as parent, guardian, employer or otherwise, and any firm or corporation, who as employer or otherwise, shall send, direct, or cause to be sent or directed any minor, to any saloon, gambling house, house of prostitution or other immoral place; or who shall employ any minor to serve intoxicating liquors to customers, or who shall employ a minor in handling intoxicating liquor or packages containing such liquors in a brewery, bottling establishment or other place where such liquors are prepared for sale or offered for sale, shall, for each offense, be punished by a fine of not less than fifty dollars (\$50.00) or imprisonment for not less than two (2) months, or by both such fine and imprisonment. [1907, p. 248, § 7; reen. R.C., § 1472; reen. 1911, ch. 159, § 172, p. 483; reen. C.L. 38:286; C.S., § 1030; I.C.A., § 43-807.]

**44-1308. Probation officers and school trustees to bring complaint.** — The probation officer, or in counties where there is no probation officer, one or more of the school trustees shall visit the various places of employment mentioned in sections 44-1301 and 44-1307 and ascertain whether any minors are employed therein contrary to the provisions of this chapter, and they shall bring complaint for offenses under this chapter to the attention of the prosecuting attorney for prosecution, but nothing herein shall be held to prohibit any reputable citizen from bringing complaint for violations of this chapter. All offenses under this chapter shall be prosecuted in the probate court [district court]. [1907, p. 248, § 8; am. R.C., § 1473; reen. 1911, ch. 159, § 173, p. 483; reen. C.L. 38:287; C.S., § 1031; I.C.A., § 43-808.]

**Compiler's notes.** The bracketed words "district court" were inserted by the compiler since the probate court has been abolished

and its jurisdiction transferred to the district court by S.L. 1969, ch. 100, § 1, which is compiled as § 1-103.

## CHAPTER 14

### EMPLOYERS' LIABILITY ACT

#### SECTION.

- 44-1401. Cases where employer deemed liable — Assumption of risk by employee.  
 44-1402. Employee's knowledge of defect or negligence — When employer excused thereby.  
 44-1403. Employee's knowledge of incompetency of coemployee — When employer excused thereby.

#### SECTION.

- 44-1404. Injury or death of minor — Who may maintain action.  
 44-1405. Death of adult employee — Who may maintain action.  
 44-1406. Damages in case of death — Maximum amount — Exemption from debts of deceased.  
 44-1407. Notice prerequisite to maintenance of action.

**44-1401. Cases where employer deemed liable — Assumption of risk by employee.** — Every employer of labor in or about a railroad, street railway, factory, workshop, warehouse, mine, quarry, engineering work, and any building which is being constructed, repaired, altered, or improved, by the use and means of a scaffold, temporary staging, or ladders or is being demolished, or on which machinery driven by steam, water or other mechanical power is being used for the purpose of construction, repair or demolition thereof, shall be liable to his employee or servant for a personal injury received by such servant or employee in the service or business of the master or employer within this state when such employee or servant was at the time of the injury in the exercise of due care and diligence in the following cases:

1. When the injury was caused by reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition.

2. When the injury was caused by reason of the negligence of any person in the service of the employer entrusted with and exercising



superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority and consent of such employer.

3. When such injury was caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer so to instruct.

4. When such injury was caused by the negligence of any person in the service or employment of the master or employer who has charge of any signal or telegraph office directing the movement of any locomotive engine, train or car upon a railroad, or any part thereof, at the time such person was injured.

5. That [in] any action brought against any employer or master under or by virtue of any of the provisions of this chapter to recover damages for injuries to or death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where a violation by such employer or master of any statute enacted for the safety of employees contributed to the injury or death of such employee.

6. An employee, by entering upon or continuing in the service of the employer, shall be presumed to have assented to the necessary risks of the occupation or employment, and no others. The necessary risks of the occupation or employment shall, in all cases arising after this chapter takes effect, be considered as including those risks, and those only, inherent in the nature of the business, which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. [1909, p. 34, 1st par. of § 1; I.C.A., § 43-2001.]

**Compiler's notes.** The bracketed word "in" in paragraph 5 was inserted by the compiler.

This chapter was omitted from Compiled Laws and Compiled Statutes. It is to a large extent superseded by the workers' compensation law, but it may still be applicable in some cases. See §§ 72-201, 72-203, 72-209 and 72-212.

**Cross ref.** Vocational rehabilitation of persons disabled in industry, § 33-2301 et seq.

**Sec. to sec. ref.** This section is referred to in §§ 44-1402 and 44-1403.

#### ANALYSIS

**Application of chapter.**

**Assumption of risk.**

**Negligence of employer.**

#### Application of Chapter.

This chapter was intended to extend the rights of employees and limit the rights of employers in personal injury cases. *Chiara v. Stewart Min. Co.*, 24 Idaho 473, 135 P. 245 (1913).

This chapter does not govern every case of

employer's liability for injury to employees, but is applicable only to specific cases enumerated in the chapter. *Sumey v. Craig Mountain Lumber Co.*, 27 Idaho 721, 152 P. 181 (1915).

Where employee was injured while piling logs delivered at a point six miles from employer's sawmill, he could not recover under this chapter, although logs were to be conveyed to employer's mill and there converted into lumber. *Sumey v. Craig Mountain Lumber Co.*, 27 Idaho 721, 152 P. 181 (1915).

Where an employee was injured when his leg was pinned between a potato piler and a tractor drawn scraper unit as the employee was working in a cellar in which potatoes were stored on employer's farm, employee's cause of action arose not from an injury received in a warehousing operation but from an injury received in an agricultural pursuit. *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975).

The applicability of this chapter to a specific cause of action arising from a personal injury must be determined by reference to the general character of the employer's business and



the work which the employee was hired to perform rather than by reference to the specific task being performed at the time of injury or the place of performance. *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975).

#### **Assumption of Risk.**

Question whether employee assumed risk or was negligent held for jury. *Tucker v. Palmberg*, 28 Idaho 693, 155 P. 981 (1916).

Employee, knowing that risk due to defective appliance exists, does not assume such risk unless he knows the danger arising therefrom. *Sumey v. Craig Mountain Lumber Co.*, 31 Idaho 234, 170 P. 112 (1918) (this case did not arise under employer's liability act).

#### **Negligence of Employer.**

Where mine loader was accustomed to ride from place of dumping ore and waste back to mouth of tunnel on bumper of back car, which was an unsafe place to ride, but employer had not furnished safe place to ride and had permitted other loaders to ride at same place,

and after working several days, loader fell from bumper and was crushed by car, employer was guilty of negligence and employee was not prevented from recovery by contributory negligence. *Chiara v. Stewart Mining Co.*, 24 Idaho 473, 135 P. 245 (1913).

Reasonably prudent master would ordinarily use a higher degree of care to keep place of work reasonably safe than would the servant occupying it. *Tucker v. Palmberg*, 28 Idaho 693, 155 P. 981 (1916).

**Collateral References.** Rescuing another, assumption of risk involved in. 158 A.L.R. 189.

Employer's compliance with specific legal standard prescribed by or pursuant to statute for equipment, structure, or material, as defense to charge of negligence. 159 A.L.R. 870.

Failure to furnish assistance to employee as affecting liability for injury or death. 36 A.L.R.2d 8.

Farm machinery, servant injured by. 67 A.L.R.2d 1120.

**44-1402. Employee's knowledge of defect or negligence — When employer excused thereby.** — The master or employer shall not be liable under any of the provisions of section 44-1401 if the servant or employee knew of the defect or negligence causing the injury, or by the exercise of reasonable care could have known of the defect or negligence causing the injury and failed within a reasonable time to give notice thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer who had entrusted to him some general superintendence, unless the master or such superior already knew of such defect or negligence. [1909, p. 34, 2d par. of § 1; I.C.A., § 43-2002.]

**Compiler's notes.** The words "provided that" were omitted from the beginning of this paragraph on account of division of section.

#### **Instructions to Jury.**

Since an injured employee's mere knowledge of the physical characteristics of the instrumentality by which the injury was inflicted did not of itself constitute contributory negligence, the trial court's instruction on

contributory negligence was defective, in an action to recover against employer for personal injuries sustained by the employee, where the jury was not instructed that the employer had to establish that the employee recognized, or in the exercise of due care should have recognized, the peril in the instrumentality. *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975).

**44-1403. Employee's knowledge of incompetency of coemployee — When employer excused thereby.** — The master or employer shall not be liable under any of the provisions of section 44-1401 where the injury to the employee was caused by the incompetency of a coemployee, and such incompetency was known to the employee injured, and the employee injured failed within a reasonable time to give notice thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer who had entrusted to him some general superintendence, unless the master or employer or such superior

already knew of such incompetency of such coemployee, and such master or employer failed or refused to discharge such incompetent employee or failed or refused to investigate the alleged incompetency of the coemployee and discharge him if found incompetent. [1909, p. 34, 3d par. of § 1; I.C.A., § 43-2003.]

**Compiler's notes.** The words "provided also that" were omitted from beginning of this paragraph on account of division of section.

**Control of Instrumentality.**

The defense of the fellow servant doctrine is not available to an employer if the employee

whose negligence caused the injury had exclusive control of the instrumentality by which the injury was inflicted. *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975).

**44-1404. Injury or death of minor — Who may maintain action. —**

In the case of injury to an employee who is a minor, then the father, or in case of his death or the desertion of his family, the mother may maintain an action for injuries received for which the master is liable under the provisions of this chapter unless the said minor be married, in which case the said minor may maintain an action in his own name for the said injuries, and a guardian may under like circumstances maintain an action for the injury of his ward, and in the event the said minor be not married and have no father or mother dependent upon him, the said action may be maintained by a guardian to be appointed by the court for the benefit of the said minor. In case the said injuries result in the death of the said minor and the said minor be married, then the action may be maintained by the widow and guardian of the said minor's children, if any there be, and if the said minor be unmarried, then the father or in case of his death or desertion of his family, the mother may maintain an action for the death of said minor child resulting under such circumstances; and if neither father nor mother survive the said minor, the action may be brought by the next of kin who at the time of his death were dependent upon his wages for support, or by the personal representatives of the minor for the benefit of such next of kin who at the time of death of the said minor were dependent upon his wages for support. [1909, p. 34, § 2; I.C.A., § 43-2004.]

**Cross ref.** Coverage of minor under workmen's compensation law, § 72-225.

**Other Laws Not Repealed.**

This law did not repeal § 5-311 authorizing prosecution of action by heirs or personal

representatives of one whose death is caused by the wrongful act or negligence of another. *Chiara v. Stewart Min. Co.*, 24 Idaho 473, 135 P. 245 (1913).

**44-1405. Death of adult employee — Who may maintain action. —**

In case the employee be not a minor and the injuries result in his death, then an action may be maintained by the widow of the deceased, or if he leaves no widow, his next of kin who at the time of his death were dependent upon his wages for support, or by his personal representatives for the benefit of his heirs or next of kin for damages against the employer under the circumstances mentioned in this chapter. [1909, p. 34, § 3; I.C.A., § 43-2005.]



**Cross ref.** See note, § 44-1404. *Chiara v. Stewart Mining Co.*, 24 Idaho 473, 135 P. 245 (1913).

**44-1406. Damages in case of death — Maximum amount — Exemption from debts of deceased.** — The amount of damages to be recovered in case of death shall not exceed the sum of \$5000. The damages recovered on account of death shall not be subject to the debts of the deceased. [1909, p. 34, § 4; I.C.A., § 43-2006.]

**Cross ref.** Income benefits for death under workmen's compensation law, § 72-413.

**44-1407. Notice prerequisite to maintenance of action.** — No action for the recovery of compensation for injuries or death under this chapter shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and fifty (150) days, and the action is commenced within one (1) year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, and shall be signed by the person injured or by someone in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in this section, he may give the same within ten (10) days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator or widow or next of kin may give such notice within sixty (60) days after such death, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury, if it be shown that there was no intention to mislead and the party entitled to notice was not in fact misled thereby. The notice required by this section shall be served in the same manner as required of the service of summons in civil actions. [1909, p. 34, § 5; I.C.A., § 43-2007.]

**Compiler's notes.** Section 6 of S.L. 1909, p. 34 repealed acts and parts of act in conflict with this chapter.

Section 7 of C.L. 1909, p. 34 declared an emergency.

**Cross ref.** Service of summons, I.R.C.P., Rule 4(a).

## CHAPTER 15

### MINIMUM WAGE LAW

#### SECTION.

44-1501. Short title.

44-1502. Minimum wages.

44-1503. Definitions.

44-1504. Employees excepted from provisions of act.

44-1505. Employment of workers with disabilities for subminimum wages.

#### SECTION.

44-1506. Apprentice.

44-1507. Posting of summary of the act.

44-1508. Enforcement.

44-1509. Discharging or discriminating against employee's asserting rights under minimum wage law prohibited.

44-1510. [Repealed.]



**44-1501. Short title.** — This act shall be known and may be cited as the "Minimum Wage Law." [1955, ch. 154, § 1, p. 301.]

**Compiler's notes.** The words "this act" refer to S.L. 1955, ch. 154 compiled as §§ 44-1501 — 44-1510. **Sec. to sec. ref.** This chapter is referred to in § 49-2438.

**44-1502. Minimum wages.** — (1) Except as hereinafter otherwise provided, no employer shall pay to any of his employees any wages computed at a rate of less than four dollars and seventy-five cents (\$4.75) commencing April 1, 1997, and five dollars and fifteen cents (\$5.15) commencing September 1, 1997, per hour for employment.

(2) In determining the wage of a tipped employee, the amount paid such employee by an employer shall be deemed to be increased on account of tips actually received by the employee but not by an amount in excess of thirty-three percent (33%) of the applicable minimum wage, beginning April 1, 1997, and until August 31, 1997, and thirty-five percent (35%) on and after September 1, 1997, as set forth in subsection (1) of this section. In the event a dispute arises between the employee and the employer with respect to the amount of tips actually received by the employee, it shall be the employer's burden to demonstrate the amount of tips actually received by the employee. Any portion of tips paid to an employee, which is shared with other employees under a tip pooling or similar arrangement, shall not be deemed, for the purpose of this section, to be tips actually received by the employee.

(3) In lieu of the rate prescribed by subsection (1) of this section, an employer may pay an employee who has not attained twenty (20) years of age a wage which is not less than four dollars and twenty-five cents (\$4.25) an hour during the first ninety (90) consecutive calendar days after such employee is initially employed. No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages or employment benefits) for purposes of hiring individuals at the wage authorized in this subsection. [1955, ch. 154, § 2, p. 301; am. 1963, ch. 9, § 1, p. 20; am. 1967, ch. 411, § 1, p. 1222; am. 1971, ch. 123, § 1, p. 422; am. 1976, ch. 38, § 1, p. 80; am. 1990, ch. 132, § 1, p. 305; am. 1990, ch. 212, § 1, p. 479; am. 1997, ch. 309, § 1, p. 916; am. 1998, ch. 107, § 1, p. 366.]

**Compiler's notes.** Section 2 of S.L. 1976, ch. 38, repealed § 44-1508 and section 3 is compiled as § 44-1508.

Section 2 of S.L. 1990, ch. 212 declared an emergency and provided that the act should take effect April 1, 1990.

Section 2 of S.L. 1997, ch. 309 declared an emergency and provided that the act should

be in effect on and after April 1, 1997.

**Sec. to sec. ref.** This section is referred to in §§ 44-1508 and 72-1367.

**Collateral References.** 51B C.J.S., Labor Relations, §§ 1017-1174.

Validity of minimum wage statutes relating to private employment. 39 A.L.R. 740.

**44-1503. Definitions.** — "Agriculture" includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil; dairying; the production, cultivation, growing and harvesting of any agricultural, aquacultural or horticultural commodities; the raising of livestock, bees, fur-bearing animals or poultry; and any practices, including

any forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with such farming operation, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

"Wages" paid to any employee includes compensation paid to such employee in the form of legal tender of the United States, checks on banks convertible into cash on demand, and also includes the reasonable cost as determined by the employment security agency to the employer of furnishing such employee with board, lodging or other facilities if such board, lodging or other facilities are customarily furnished by such employer to his employee and used by employees, and commissions of every kind, and tips or gratuities as provided by section 44-1502, Idaho Code.

"Employ" includes to suffer or permit to work. "Employee" includes any individual employed by an employer. "Employer" includes any person employing an employee or acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any state or political subdivision of a state, or any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

"Person" means any individual, partnership, association, corporation, business, trust, legal representative, or any organized group of persons.

"Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than thirty dollars (\$30.00) a month in tips. [1955, ch. 154, § 3, p. 301; am. 1957, ch. 184, § 1, p. 362; am. 1990, ch. 132, § 2, p. 305; am. 2001, ch. 70, § 1, p. 140.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1957, ch. 184, was repealed

by S.L. 1976, ch. 38, § 6.

Section 3 of S.L. 1990, ch. 132 declared an emergency. Approved April 1, 1990.

**44-1504. Employees excepted from provisions of act. —** The provisions of this act shall not apply to:

- (1) Any employee employed in a bona fide executive, administrative or professional capacity; or
- (2) Anyone engaged in domestic service; or
- (3) Any individual employed as an outside salesman; or
- (4) Seasonal employees of a nonprofit camping program; or
- (5) Any child under the age of sixteen (16) years working part time or at odd jobs not exceeding a total of four (4) hours per day with any one (1) employer; or
- (6) Any individual employed in agriculture if:
  - (a) Such employee is the parent, spouse, child or other member of his employer's immediate family; or
  - (b) Such employee is older than sixteen (16) years of age and:
    - (i) Is employed as a harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, and



- (ii) Commutes daily from his permanent residence to the farm on which he is so employed, and
- (iii) Has been employed in agriculture less than thirteen (13) weeks during the preceding calendar year; or
- (c) Such employee is sixteen (16) years of age or under and:
  - (i) Is employed as a harvest laborer, is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, and
  - (ii) Is employed on the same farm as his parent or person standing in the place of his parent, and
  - (iii) Is paid at the same piece-rate basis as employees over the age of sixteen (16) years are paid on the same farm; or
- (d) Such employee is principally engaged in the range production of livestock. [1955, ch. 154, § 4, p. 301; am. 1959, ch. 59, § 1, p. 128; 1967, ch. 411, § 2, p. 1222; am. 1978, ch. 307, § 1, p. 770; am. 2001, ch. 70, § 2, p. 140.]

**Collateral References.** Who is employed in "executive or administrative capacity" within exemptions from minimum and maximum hours provisions of Fair Labor Standards Act. 131 A.L.R. Fed. 1; 124 A.L.R. Fed. 1.

Validity and construction of domestic service provisions of Fair Labor Standards Act (29 U.S.C. §§ 201 et seq.). 165 A.L.R. Fed. 163.

**44-1505. Employment of workers with disabilities for subminimum wages.** — The payment of the minimum wage under this act shall not apply to a worker with disabilities, if the employer is issued a special certificate, as provided now or hereafter under the federal fair labor standards act. [1955, ch. 154, § 5, p. 301; am. 1974, ch. 39, § 61, p. 1023; am. 1996, ch. 421, § 17, p. 1406.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1501.  
Sections 57 to 60 of S.L. 1974, ch. 39 were

repealed, § 56 is compiled as § 39-4009.  
Section 15 of S.L. 1996, ch. 421 is compiled as § 44-1812 and § 16 contained a repeal.

**44-1506. Apprentice.** — For any employment in which the minimum wage is applicable, the director of the department of labor may issue to an apprentice or learner a special license authorizing the employment of such apprentice or learner for the time and under the conditions which he determines and at a wage less than the minimum wage established by this act. Apprentice or learner shall include a student or students enrolled in a bona fide secondary school program administered by an accredited school district which includes work training experience. The director may hold such hearings and conduct such investigations as he shall deem necessary before fixing a special wage for such apprentice or learner. [1955, ch. 154, § 6, p. 301; am. 1974, ch. 39, § 62, p. 1023; am. 1976, ch. 223, § 1, p. 796; am. 1996, ch. 421, § 18, p. 1406.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1501.



**44-1507. Posting of summary of the act.** — Every employer subject to this act shall keep a summary of this act, furnished by the director of the department of labor, without charge, posted in a conspicuous place, in or about the premises wherein any person subject to the act is employed, or in a place accessible to his employees. [1955, ch. 154, § 7, p. 301; am. 1974, ch. 39, § 63, p. 1023; am. 1996, ch. 421, § 19, p. 1406.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1501.

Section 97 of S.L. 1974, ch. 39 provided that this act take effect on and after July 1, 1974.

Sections 64 through 68 of S.L. 1974, ch. 39 were repealed and § 69 is compiled as § 44-1701.

**44-1508. Enforcement.** — (1) When the director of the department of labor has reason to believe that an employer is engaged in an act or practice which violates or will violate a provision of chapter 15, title 44, Idaho Code, he may bring an action in a court of competent jurisdiction to enjoin the act or practice, and to enforce compliance with the provisions of chapter 15, title 44, Idaho Code. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(2) A claim for unpaid minimum wages as set forth in section 44-1502, Idaho Code, may be treated as a claim for wages due and owing under chapter 6, title 45, Idaho Code. Such claim shall not be subject to the limitation contained in section 45-617(1), Idaho Code. Any action for such wages must be commenced in a court of competent jurisdiction within two (2) years after the cause of action shall have accrued. [I.C., § 44-1508, as added by 1976, ch. 38, § 3, p. 80; am. 1996, ch. 421, § 20, p. 1406; am. 1999, ch. 51, § 1, p. 115.]

**Compiler's notes.** Former § 44-1508 which comprised 1955, ch. 154, § 8, p. 301; 1974, ch. 39, § 64, p. 1023, was repealed by S.L. 1976, ch. 38, § 2.

Section 21 of S.L. 1996, ch. 421 is compiled as § 44-1806.

Section 2 of S.L. 1999, ch. 51, is compiled as § 45-601.

Section 1 of S.L. 1976, ch. 38, is compiled as § 44-1502.

**44-1509. Discharging or discriminating against employee's asserting rights under minimum wage law prohibited.** — No employer shall discharge or in any other manner discriminate against any employee:

(1) Because the employee has made complaint that he has not been paid wages in accordance with chapter 15, title 44, Idaho Code.

(2) Because the employee has caused to be instituted or is about to cause to be instituted any proceedings under or related to chapter 15, title 44, Idaho Code.

(3) Because the employee has testified or is about to testify in any proceedings under or related to chapter 15, title 44, Idaho Code. [I. C., § 44-1509, as added by 1976, ch. 38, § 5, p. 80.]

**Compiler's notes.** Former § 44-1509 which comprised 1955, ch. 154, § 9, p. 301, was repealed by S.L. 1976, ch. 38, § 4.

**44-1510. Employees' remedies. [Repealed.]**

**Compiler's notes.** This section, which comprised 1955, ch. 154, § 10, p. 301; 1957, ch. 184, § 2, p. 362, was repealed by S.L. 1976, ch. 38, § 6.

**CHAPTER 16****FARM LABOR CONTRACTOR LICENSING****SECTION.**

- 44-1601. Definitions.
- 44-1602. Exemptions.
- 44-1603. License — Application — Contents.
- 44-1604. Applicant — Proof of financial responsibility — Payment of claims.
- 44-1605. Application fee — Appropriation.
- 44-1606. Department — Licensing Duties — License — Term — Renewal fee.
- 44-1607. Farm labor contractor — Duties.
- 44-1608. Farm labor contractor — Applicant for license — Prohibited acts.
- 44-1609. License — Denial, revocation, suspension, refusal to renew.

**SECTION.**

- 44-1610. Action against license — Hearing.
- 44-1611. Joint liability.
- 44-1612. Claim for wages — Exclusive remedy.
- 44-1613. Private right of action.
- 44-1614. Service of process when unlicensed contractor is unavailable.
- 44-1615. Retaliation prohibited.
- 44-1616. Violations — Penalty.
- 44-1617. Department — Administrative rules.
- 44-1618. Severability.

**44-1601. Definitions. — As used in this chapter:**

(1) "Agricultural association" means any nonprofit or cooperative association of farmers, growers or ranchers, incorporated or qualified under applicable state law.

(2) "Agricultural employer" means any person engaged in any activity included within the definition of "agriculture" in subsection (3) of this section.

(3) "Agriculture" includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil; dairying; the production, cultivation, growing and harvesting of any agricultural, aquacultural or horticultural commodities; the raising of livestock, bees, fur-bearing animals or poultry; and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operation, including preparation for market, delivery to storage or to market or to carriers for transportation to market. This definition shall not include forestry, lumbering operations or logging contractors.

(4) "Department" means the department of labor of the state of Idaho.

(5) "Director" means the director of the department of labor.

(6) "Farm labor contracting activity" means recruiting, soliciting, hiring, employing, furnishing or transporting any migrant or seasonal agricultural worker.

(7) "Farm labor contractor" means any person who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(8) "Immediate family member" means the spouse, children, brother, sister, mother or father.

(9) "Migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or temporary nature, and who is



required to be absent overnight from his permanent place of residence. This term does not include any immediate family member of an agricultural employer or a farm labor contractor.

(10) "Person" means an individual, association, partnership, limited liability company, corporation or other business entity.

(11) "Seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or temporary nature and is not required to be absent overnight from his permanent place of residence. This term does not include any immediate family member of an agricultural employer or a farm labor contractor. [I.C., § 44-1601, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Former sections 44-1601 — 44-1606, which comprised (1965, ch. 154, §§ 1-6, p.299; 1974, ch. 39, §§ 65-68, p. 1023), relating to employment discrimination because of age, were repealed by S.L. 1982,

ch. 83, § 7. For present law, see §§ 67-5901 —67-5912.

Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1602. Exemptions.** — The provisions of this chapter shall not apply to the following:

(1) An agricultural association engaged in farm labor contracting activities exclusively for members of that association.

(2) Any individual engaged in farm labor contracting for an agricultural operation owned or operated exclusively by such individual or a member of such individual's immediate family, if such activities are performed only for such operation and exclusively by such individual, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

(3) Agricultural employers exchanging agricultural labor or services with each other, provided the work is performed on land owned or leased by the agricultural employers.

(4) Any common carrier that would be a farm labor contractor solely because it is engaged in transporting any migrant or seasonal agricultural worker. For purposes of this section, a common carrier is one that holds itself out to the general public to engage in transportation of passengers for hire, whether over regular or irregular routes, and holds a valid certificate or authorization for such purpose from an appropriate local, state or federal agency.

(5) Any nonprofit charitable organization, public entity or private nonprofit educational institution.

(6) Any employee of a person described in subsections (1) through (5) of this section when performing farm labor contracting activities exclusively for such person, unless the employee receives a commission or fee based upon the number of workers recruited. [I.C., § 44-1602, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.



**44-1603. License — Application — Contents.** — (1) Except as otherwise provided, no person shall act as a farm labor contractor unless such person holds a valid license issued by the department.

(2) An application for a farm labor contractor's license shall be sworn to by the applicant and shall be submitted on a form prescribed by the department that shall require, but not be limited to, the following information and documentation:

(a) The applicant's name, Idaho address and all other temporary and permanent addresses the applicant uses or knows will be used in the future;

(b) Two (2) recent, passport sized, color photographs of the applicant, or the applicant's authorized agent when the applicant is not a natural person;

(c) A statement by the applicant of all facts required by the department concerning the applicant's fitness, competency, and qualifications to engage in the business of farm labor contracting;

(d) A statement by the applicant of all facts required by the department concerning the manner and method by which the applicant proposes to conduct operations as a farm labor contractor;

(e) A certificate of insurance issued by the applicant's auto insurance carrier listing the department as the certificate holder and providing for a thirty (30) day cancellation notice for all vehicles used in the operation of the farm labor contracting business;

(f) A certificate of workers' compensation insurance issued by the applicant's workers' compensation insurance carrier listing the department as the certificate holder and providing for a thirty (30) day cancellation notice;

(g) Whether the applicant has or was ever granted a farm labor contractor's license in any other jurisdiction;

(h) Whether the applicant was ever denied a license or had a license revoked or suspended under the farm labor contractor laws of any other jurisdiction;

(i) The names and addresses of all persons financially interested, whether as partners, limited liability company members, shareholders, associates, or profit sharers in the applicant's proposed operation as a farm labor contractor, together with the amount of their respective interests, and whether or not, to the best of the applicant's knowledge, any such persons were ever denied a license or had a license revoked or suspended under the farm labor contractor laws of any jurisdiction; and

(j) The following declaration by the applicant, or the applicant's authorized agent when the applicant is not a natural person: "With regards to any action filed against the applicant concerning the applicant's activities as a farm labor contractor, the applicant appoints the director of the Idaho Department of Labor as the applicant's lawful agent to accept service of summons when the applicant is not present in the jurisdiction in which such action is commenced or have in any other way become unavailable to accept service." [I.C., § 44-1603, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1604. Applicant — Proof of financial responsibility — Payment of claims.** — (1) Each applicant shall submit with the application and shall continually maintain proof of financial responsibility to ensure the prompt payment of employees' wages pursuant to chapter 6, title 45, Idaho Code, and the payment of any claims awarded pursuant to section 44-1613, Idaho Code.

(2) Proof of financial responsibility shall be in the form of a surety bond from a company licensed to do business in the state of Idaho. The surety bond shall be in the amount of ten thousand dollars (\$10,000) if the farm labor contractor employs no more than twenty (20) employees, and thirty thousand dollars (\$30,000) if the contractor employs more than twenty (20) employees.

(3) The surety bond shall be for the benefit of the farm labor contractor's employees and shall be conditioned upon the payment of all sums legally owing to them.

(4) The surety bond shall be executed to cover the farm labor contractor's liability for the period for which the license is issued, during which time the bond cannot be canceled or otherwise terminated.

(5) All claims against the bond shall be unenforceable unless request for payment of a court judgment, or lien pursuant to section 45-620, Idaho Code, has been sent by certified mail to the surety. The surety company shall make prompt and periodic payments on the farm labor contractor's liability to the extent of the total amount of the bond.

(6) In lieu of the surety bond required by this section, an applicant or farm labor contractor may deposit with the department cash or other security acceptable to the director. The deposit shall not be less than ten thousand dollars (\$10,000) if the farm labor contractor employs no more than twenty (20) employees, and thirty thousand dollars (\$30,000) if the farm labor contractor employs more than twenty (20) employees. The security deposited with the director in lieu of the surety bond shall be returned to the farm labor contractor at the expiration of two (2) years after the farm labor contractor's license has expired or been otherwise terminated, unless the director has received written notice that a legal or administrative action has been instituted against the farm labor contractor for failing to comply with the requirements of this chapter. [I.C., § 44-1604, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1605. Application fee — Appropriation.** — Each application shall be accompanied by a nonrefundable fee of two hundred fifty dollars (\$250). All fees collected shall be continuously appropriated to the department and used for the administration of this chapter. [I.C., § 44-1605, as added by 2002, ch. 328, § 1, p. 919.]



**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1606. Department — Licensing Duties — License — Term — Renewal fee.** — (1) The department shall issue licenses to persons who are at least eighteen (18) years of age and who have shown themselves to be fit, competent and qualified to engage in the business of farm labor contracting. Factors to be considered by the department in making this determination shall include, but not be limited to, the following:

- (a) Whether an applicant has unsatisfied judgments or administrative decisions requiring the payment of unpaid wages;
- (b) Whether an applicant has worker's compensation coverage for each employee;
- (c) Whether an applicant has paid unemployment insurance contributions when due;
- (d) Whether an applicant has violated any provision of this chapter or the rules adopted hereunder;
- (e) Whether an applicant was ever denied a license or had a license revoked, suspended or not renewed under the farm labor contractor laws of any jurisdiction;
- (f) Whether an applicant has employed an agent who has had a farm labor contractor license denied, suspended, revoked or not renewed or who has otherwise violated any provisions of this chapter or the rules adopted hereunder; and
- (g) Whether an applicant, when required by law, has failed or refused to seek food, water, shelter or medical attention, or to provide any other goods or services required for the safety and health of the applicant's employees.

(2) The industrial commission shall make records available to the department, including records that are otherwise exempt from disclosure under section 9-340B, Idaho Code, for the purpose of determining an applicant's qualifications under subsection (1)(b) of this section. Records disclosed under this subsection shall not be further disclosed by the department.

(3) The department shall issue a license within fifteen (15) business days of receipt of a completed application if the department determines the applicant to be fit, competent and qualified to engage in the business of farm labor contracting. An application shall be deemed completed when all required information and documentation has been submitted to the department.

(4) The license shall not be transferable or assignable.

(5) The first year of licensing shall run from April 1st to the following March 31st and each license shall expire on March 31st following the date of its issuance unless sooner revoked or otherwise terminated by the department. Beginning January 1, 2004, the licensing year shall run from January 1st to the following December 31st and each license shall expire on December 31st following the date of its issuance unless sooner revoked or otherwise terminated by the department.

(6) A license may be renewed annually upon payment of a nonrefundable fee of two hundred fifty dollars (\$250) and by providing the following:



- (a) Proof of financial responsibility as required by section 44-1604, Idaho Code;
- (b) A certificate of insurance as required by section 44-1603(2)(e), Idaho Code; and
- (c) A certificate of insurance as required by section 44-1603(2)(f), Idaho Code.

The department may require any person seeking renewal to file a new application showing the person to be fit, competent and qualified to continue to engage in the business of farm labor contracting.

(7) The department shall maintain a central public registry of all persons issued a farm labor contractor's license. [I.C., § 44-1606, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1607. Farm labor contractor — Duties.** — A farm labor contractor shall:

(1) Carry his farm labor contractor license at all times and exhibit such license upon request to anyone with whom the farm labor contractor intends to deal in his capacity as a farm labor contractor.

(2) File immediately at the United States post office serving the farm labor contractor's address as noted on the license a correct change of address and notify the department each time an address change is made.

(3) Pay or distribute promptly when due to the persons entitled all money or other things of value entrusted to the farm labor contractor for that purpose.

(4) Comply with the terms and provisions of all agreements or contracts entered into by the farm labor contractor.

(5) Comply with all applicable state laws and rules.

(6) Provide to the department certified copies of payroll records for any payment period requested by the department.

(7) Provide to each employee at the time of hiring, recruiting, soliciting or supplying such employee, whichever occurs first, a written statement in English or, as necessary and reasonable, in Spanish or other language common to agricultural workers who are not fluent or literate in English, that contains a description of:

(a) The rate of compensation and the method of computing the rate of compensation;

(b) The terms and conditions of employment, including the name and address of the farm labor contractor, the place of employment, the approximate length of the period of employment and the approximate starting and ending dates;

(c) The terms and conditions of any bonus offered and the manner of determining when the bonus is earned;

(d) The terms and conditions of any loan made to the employee;

(e) The terms and conditions of any housing, transportation, equipment, health care, day care or any other employee benefit to be provided by the

farm labor contractor or the farm labor contractor's agent, and the costs to be charged for each item;

(f) The name and address of the surety on the farm labor contractor's bond;

(g) The employee's rights and remedies, including an employee's right to make a claim against the farm labor contractor's surety bond.

(8) Provide to the employee each time the employee receives a compensation payment from the farm labor contractor a written statement itemizing the total payment, the amount and purpose of each deduction therefrom, the hours worked and, if the work was done on a piece basis, the number of pieces completed.

(9) For each employee make, keep and preserve for three (3) years the following information:

(a) The basis on which wages were paid;

(b) The number of piecework units earned, if paid on a piecework basis;

(c) The number of hours worked;

(d) The total pay period earnings;

(e) The specific sums withheld and the reason for withholding each sum;

(f) The net pay; and

(g) The name and address of the owner of all operations, or the owner's agent, where the employee worked. [I.C., § 44-1607, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1608. Farm labor contractor — Applicant for license — Prohibited acts.** — A farm labor contractor or an applicant for a farm labor contractor's license shall not:

(1) Make misrepresentations or false statements on the application for a license.

(2) Make or cause to be made, to any person, any false, fraudulent or misleading representation, or publish or circulate or cause to be published or circulated any false, fraudulent or misleading information concerning the terms, conditions or existence of any employment.

(3) Solicit, induce or cause to be solicited or induced the violation of an existing contract of employment.

(4) Violate, or assist another person to violate the requirements of this chapter.

(5) By any force, intimidation, or threat, including threat of deportation, induce any employee of the farm labor contractor to give up any part of the compensation to which the employee is entitled under federal or state wage payment laws. [I.C., § 44-1608, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.



**44-1609. License — Denial, revocation, suspension, refusal to renew.** — (1) The department may deny, revoke, suspend or refuse to renew a farm labor contractor license when:

- (a) The applicant or licensee, or the agent of the applicant or licensee, has had his farm labor contractor's license denied or revoked in any jurisdiction within three (3) years of the date of application;
- (b) The licensee or his agent has violated or failed to comply with any provision of this chapter or the rules promulgated hereunder;
- (c) The applicant or licensee has an unsatisfied court judgment or final administrative decision against him for unpaid wages;
- (d) The applicant or licensee made false or misleading statements on, or provided false or misleading information with, his application for a license;
- (e) The applicant or licensee fails to maintain proof of financial responsibility as required by section 44-1604, Idaho Code;
- (f) The applicant or licensee fails to provide, or the department receives notice of cancellation of any certificates of insurance required by section 44-1603, Idaho Code;
- (g) The applicant or licensee fails to pay unemployment insurance contributions when due; or
- (h) The applicant or licensee, when required by law, fails or refuses to seek food, water, shelter or medical attention, or to provide any other goods or services required for the safety and health of his employees.

(2) Before the department denies, revokes, suspends or refuses to renew a license, the applicant or licensee shall be given written notice of the reasons for the licensing action and an opportunity for a hearing. [I.C., § 44-1609, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1610. Action against license — Hearing.** — (1) The contested case provisions of the Idaho administrative procedure act, chapter 52, title 67, Idaho Code, shall not apply to licensing actions under this chapter.

(2) When it appears, pursuant to section 44-1609, Idaho Code, that sufficient cause exists for the denial of any application for, the revocation or suspension of, or refusal to renew any license required by this chapter, the department shall serve notice, in the manner provided for in subsection (7) of this section, to the applicant or license holder stating the proposed adverse action to be taken, the grounds on which such action is based, and that the department's proposed action shall become final unless, within ten (10) calendar days of the date of mailing of the notice, the aggrieved party files with the department a written request for a hearing.

(3) A written request for a hearing may be filed by personal delivery, by mail, or by fax to the wage and hour section of the department at the address indicated on the notice. The date of personal delivery shall be noted on the request and shall be deemed the date of filing. If mailed, the hearing request shall be deemed to be filed on the date of mailing as determined by the



postmark. A faxed request that is received by the wage and hour section by 5:00 p.m. on a business day shall be deemed filed on that date. A faxed request that is received by the wage and hour section on a weekend, holiday or after 5:00 p.m. on a business day shall be deemed filed on the next business day.

(4) Reasonable notice of the hearing, containing the date, time, place and purpose of the hearing, shall be served on all parties to the hearing in the manner provided for in subsection (7) of this section.

(5) The hearing shall be conducted by an employee of the department designated by the director to be the hearing officer, who shall not be bound by statutory rules of evidence or by technical or formal rules of procedure. A record shall be made of the sworn testimony. Every party to the proceeding shall have the right to counsel at their own expense and a full opportunity to be heard, including such cross-examination as may be appropriate. The hearing officer, as soon after the conclusion of the hearing as possible, on the basis of the record made at the hearing, shall issue a decision and serve it on all parties to the hearing in the manner provided for in subsection (7) of this section.

(6) The decision of the hearing officer shall be a final agency order and shall be effective on the date it is issued, subject only to the judicial review provisions of chapter 52, title 67, Idaho Code.

(7) Any notice or decision required by this section shall be deemed served if delivered to the person being served or if mailed to his last known address. Service by mail shall be deemed completed on the date of mailing. The date indicated on the notice or decision as the "date of mailing" shall be presumed to be the date the document was deposited in the United States mail, unless otherwise shown by a preponderance of competent evidence. [I.C., § 44-1610, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1611. Joint liability.** — (1) If an agricultural employer uses a farm labor contractor who is properly licensed and bonded under the provisions of this chapter, that agricultural employer shall not be jointly and severally liable for any unpaid wages determined to be due and owing pursuant to chapter 6, title 45, Idaho Code, to any employee of the farm labor contractor who performed work for that agricultural employer.

(2) An agricultural employer who knowingly uses the services of an unlicensed farm labor contractor shall be jointly and severally liable for any unpaid wages determined to be due and owing pursuant to chapter 6, title 45, Idaho Code, to any employee of the unlicensed farm labor contractor who performed work for that agricultural employer. In making determinations under this section, any user of a farm labor contractor may rely upon either the license issued by the department to the farm labor contractor under section 44-1603, Idaho Code, or the department's representation that such contractor is licensed as required by this chapter. [I.C., § 44-1611, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1612. Claim for wages — Exclusive remedy.** — A claim for unpaid wages by an employee of a farm labor contractor shall be treated as a claim for wages under chapter 6, title 45, Idaho Code. [I.C., § 44-1612, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1613. Private right of action.** — Except as provided for in section 44-1612, Idaho Code, any person aggrieved by a violation of this chapter may bring a civil action in a court of competent jurisdiction for injunctive relief, damages or both. If the court finds that any person violated any of the provisions of this chapter, it shall award actual damages, plus an amount equal to treble the amount of actual damages, or one thousand dollars (\$1,000) per violation, whichever is greater. The court shall also award a prevailing plaintiff reasonable attorney's fees and costs. No action under this section may be commenced later than two (2) years after the date of the violation giving rise to the right of action. [I.C., § 44-1613, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1614. Service of process when unlicensed contractor is unavailable.** — In any action arising out of the activities of an unlicensed farm labor contractor within this state who is not in the state or is otherwise unavailable for service of process in this state, the unlicensed farm labor contractor may be served by mailing a certified true copy of the summons and complaint to the director; the last-known address, if any, of the unlicensed farm labor contractor; and any other address the use of which the plaintiff knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice. [I.C., § 44-1614, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1615. Retaliation prohibited.** — No farm labor contractor may discharge or in any other manner discriminate against an employee because that employee made a claim against the farm labor contractor pursuant to this chapter, testified or is about to testify in any proceedings brought pursuant to this chapter, or discussed or consulted with anyone concerning the employee's rights under this chapter. [I.C., § 44-1615, as added by 2002, ch. 328, § 1, p. 919.]



**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1616. Violations — Penalty.** — (1) Any person who intentionally defaces, alters or changes a farm labor contractor license, or who uses the license of another, or who knowingly permits another person to use his license or acts as a farm labor contractor without a license shall be guilty of a misdemeanor, punishable by a fine not to exceed one thousand dollars (\$1,000), or up to sixty (60) days in jail or both. Each violation shall constitute a separate offense.

(2) Any person who violates any other provision of this chapter shall be guilty of a misdemeanor, punishable by a fine not to exceed three hundred dollars (\$300), or up to thirty (30) days in jail or both. Each violation shall constitute a separate offense. [I.C., § 44-1616, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1617. Department — Administrative rules.** — The department may adopt rules reasonably necessary for the administration of this chapter. [I.C., § 44-1617, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

**44-1618. Severability.** — The provisions of this chapter are hereby declared to be severable, and if any provision is declared void, invalid, or unenforceable in whole or in part, such declaration shall not affect the remaining provisions of this chapter. [I.C., § 44-1618, as added by 2002, ch. 328, § 1, p. 919.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 328 provided that the act should take effect on and after January 1, 2003.

## CHAPTER 17

### DISCRIMINATORY WAGE RATES BASED UPON SEX

#### SECTION.

44-1701. Definitions.

44-1702. Discriminatory payment of wages based upon sex prohibited.

44-1703. Powers and duties of director with

#### SECTION.

respect to unlawful pay practices.

44-1704. Procedures for collection of unpaid wages.

**44-1701. Definitions.** — As used in this act:

(1) "Employee" means any individual employed by an employer, including individuals employed by the state or any of its political subdivisions.



(2) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(3) "Wage rate" means all compensation for employment, including payment in kind and amounts paid by employers for employee benefits, as defined by the director in regulations issued under this act.

(4) "Employ" includes to suffer or permit to work.

(5) "Occupation" includes any industry, trade, business or branch thereof, or any employment or class of employment.

(6) "Director" means the director of the human rights commission. [1969, ch. 252, § 1, p. 783; am. 1974, ch. 39, § 69, p. 1023; am. 1982, ch. 83, § 6, p. 151.]

**Compiler's notes.** The words "this act" refer to S.L. 1969, ch. 252 compiled as §§ 44-1701 — 44-1704.

Sections 64 to 68 of S.L. 1974, ch. 39 were repealed, § 63 is compiled as § 44-1507 and § 70 is compiled as § 44-1703.

Section 5 of S.L. 1982, ch. 83 is compiled as § 67-5911. Section 7 contained a repeal.

**Cross ref.** Commission on human rights, §§ 67-5901 — 67-5912.

**Collateral References.** Application of state law to sex discrimination in employ-

ment advertising. 66 A.L.R.3d 1237.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) making sex discrimination in employment unlawful. 12 A.L.R. Fed. 15; 115 A.L.R. Fed. 1; 116 A.L.R. Fed. 1; 123 A.L.R. Fed. 1.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer". 160 A.L.R. Fed. 441.

**44-1702. Discriminatory payment of wages based upon sex prohibited.** — (1) No employer shall discriminate between or among employees in the same establishment on the basis of sex, by paying wages to any employee in any occupation in this state at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility. Differentials which are paid pursuant to established seniority systems or merit increase systems, which do not discriminate on the basis of sex, are not within this prohibition.

(2) No person shall cause or attempt to cause an employer to discriminate against any employee in violation of this act.

(3) No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of this act. [1969, ch. 252, § 2, p. 783.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1701.

**Sec. to sec. ref.** This section is referred to in § 44-1704.

**Collateral References.** 48 Am. Jur. 2d, Labor and Labor Relations, § 1294.

14A C.J.S., Civil Rights, § 172.

Discrimination against pregnant employee as violation of state fair employment laws. 99 A.L.R.5th 1.

Construction and application of provisions of Equal Pay Act of 1963 (29 U.S.C. § 206(d))

prohibiting wage discrimination on basis of sex. 7 A.L.R. Fed. 707.

Propriety of treating separate entities as one for determining number of employees required by Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e(b)) for action against "employer". 160 A.L.R. Fed. 441.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes — private employment cases. 162 A.L.R. Fed. 273.

**44-1703. Powers and duties of director with respect to unlawful pay practices.** — (1) The director is authorized to endeavor to eliminate pay practices unlawful under this act, by informal methods of conference, conciliation and persuasion, and to supervise the payment of wages owing to any employee under this act.

(2) The director shall have power to issue such regulations, not inconsistent with the purpose of this act, as he deems necessary or appropriate to carry out its provisions.

(3) Employers shall be furnished copies or abstracts of this act and such regulations by the director on request without charge. [1969, ch. 252, § 3, p. 783; am. 1974, ch. 39, § 70, p. 1023.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1701.

Section 69 of S.L. 1974, ch. 39 is compiled as § 44-1701.

**Construction.**

The enactment of §§ 18-7303, 67-5909, and this section expressed a clear, unambiguous intent to prohibit discrimination in employment practices on the basis of sex. Idaho

Trailer Coach Ass'n v. Brown, 95 Idaho 910, 523 P.2d 42 (1974).

Since § 44-1107 is irreconcilable with the policy and operation of §§ 18-7303, 67-5909 and this section, their enactment repealed § 44-1107 by implication. Idaho Trailer Coach Ass'n v. Brown, 95 Idaho 910, 523 P.2d 42 (1974).

**44-1704. Procedures for collection of unpaid wages.** — (1) Any employer who violates the provisions of section 44-1702, Idaho Code, shall be liable to the employee or employees affected in the amount of their unpaid wages, and in instances of wilful violation in employee suits under subsection (2) of this section, up to an additional equal amount as liquidated damages.

(2) Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. The court in such action shall, in cases of violation in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

(3) No agreement by any such employee to work for less than the wage to which such employee is entitled under this act shall be a bar to any such action, or to a voluntary wage restitution of the full amount due under this act.

(4) At the written request of any employee claiming to have been paid less than the wage to which he may be entitled under this act, the director may bring any legal action necessary in behalf of the employee to collect such claim for unpaid wages. The director shall not be required to pay the filing fee, or other costs, in connection with such action. The director shall have power to join various claims against the employer in one (1) cause of action.

(5) In proceedings under this section, the court may order other affirmative action as appropriate, including reinstatement of employees discharged in violation of this act.

(6) The director shall have power to petition any court of competent jurisdiction to restrain violations of section 44-1702, Idaho Code, and for such affirmative relief as the court may deem appropriate, including



restoration of unpaid wages and reinstatement of employees, consistent with the purpose of this act. [1969, ch. 252, § 4, p. 783; am. 1974, ch. 39, § 71, p. 1023.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1701.

Section 72 of S.L. 1974, ch. 39, is compiled as § 45-601.

Section 5 of S.L. 1969, ch. 252 read: "The provisions of this act are hereby declared to be severable and if any provisions of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Section 97 of S.L. 1974, ch. 39 provided that this act take effect on and after July 1, 1974.

#### **Measure of Costs.**

The proper measure of attorney fees under

subsection (2) of this section, a state law cause of action, is governed by the I.R.C.P. 54(e)(3). *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

Although the language of subsection (2) of this section is broader than the language of I.R.C.P. 54(d)(1), the rule is the proper measure for costs under this statutory section, since without specific language to the contrary in the statute, the rules of civil procedure provide the correct basis by which to measure an award of costs in an action to collect unpaid wages. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

## **CHAPTER 18**

### **EMPLOYMENT OF FIREFIGHTERS**

#### **SECTION.**

44-1801. Definitions.

44-1802. Collective bargaining rights of firefighters — Representation by bargaining agent.

44-1803. Recognition of exclusive bargaining agent.

44-1804. Obligation of corporate authorities to bargain in good faith — Entering into written contract.

44-1805. Submission of issues to fact finding commission.

44-1806. Appointment of fact-finding commission — Public officials and employees ineligible — Payment of expenses.

#### **SECTION.**

44-1807. Negotiated agreements constitute contract.

44-1808. Notice of request for bargaining on matters requiring appropriation.

44-1809. Notice of hearing before fact finding commission — Presentation of evidence — Determination by majority.

44-1810. Written recommendation of commission — Copies to parties.

44-1811. Strikes prohibited during contract.

44-1812. Minimum standards for employing paid firefighters.

**44-1801. Definitions.** — As used in this act the following terms shall have the following meanings:

(1) "Firefighter" shall mean the paid members, except supervisors, of any regularly constituted fire department in any city, county, fire district or political subdivision within the state. The term "supervisor" means any individual having authority in the interest of an employer to hire, direct, assign, promote, reward, transfer, lay off, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to effectively recommend such action if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; provided, the term "supervisor" shall include only those individuals who perform a preponderance of the above specified acts of authority on a day-to-day basis; and provided further, a supervisor's administrative responsibilities must include demonstrated



involvement in policy and budget formulation for the department. Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either state or local, related to collective bargaining.

(2) "Corporate authority" shall mean the council, commission, trustees, or any other governing body of any city, county, fire district or political subdivision whose duty it is to establish wages, working conditions, and other conditions of employment of firefighters. [1970, ch. 138, § 1, p. 333; am. 1977, ch. 98, § 1, p. 205; am. 1999, ch. 50, § 1, p. 112.]

**Compiler's notes.** The words "this act" refer to S.L. 1970, ch. 138, compiled as §§ 44-1801 — 44-1811.

Section 2 of S.L. 1977, ch. 98 is compiled as § 44-1803.

Section 2 of S.L. 1999, ch. 50, is compiled as § 44-1812.

Section 4 of S.L. 1999, ch. 50 declared an emergency. Approved March 11, 1999.

**Cited in:** International Ass'n of Firefighters Local No. 672 v. Boise City, 136 Idaho 162, 30 P.3d 940 (2001).

**44-1802. Collective bargaining rights of firefighters — Representation by bargaining agent.** — The firefighters in any city, county, fire district or other political subdivision in the state of Idaho shall have the right to bargain collectively with their respective cities, counties, fire districts or political subdivisions and to be represented by a bargaining agent in such collective bargaining process as to wages, rates of pay, working conditions and all other terms and conditions of employment. [1970, ch. 138, § 2, p. 333.]

#### **Rights Violated.**

The contract the City of Boise made with the Idaho National Guard (IDANG) to provide Air Rescue Fire Fighting (ARFF) services at the Boise municipal airport did not violate the Idaho Constitution or the Idaho Civil Service Act; however, the firefighters were entitled to collectively bargain in anticipation of the City's actions to replace union employees with

IDANG firefighters to perform the work previously performed by union members; and by refusing to negotiate with the union, the City violated the Collective Bargaining Act. International Ass'n of Firefighters Local No. 672 v. Boise City, 136 Idaho 162, 30 P.3d 940 (2001).

**Collateral References.** 48 Am. Jur. 2d, Labor and Labor Relations, §§ 438-538. 51A C.J.S., Labor Relations, § 1041.

**44-1803. Recognition of exclusive bargaining agent.** — The organization selected by the majority of the firefighters in any city, county, fire district or political subdivision shall be recognized as the sole and exclusive bargaining agent for all of the firefighters in the fire department, unless and until recognition of such bargaining agent is withdrawn by vote of the majority of the firefighters of such department. [1970, ch. 138, § 3, p. 333; am. 1977, ch. 98, § 2, p. 205.]

**Compiler's notes.** Section 1 of S.L. 1977, ch. 98 is compiled as § 44-1801.

**44-1804. Obligation of corporate authorities to bargain in good faith — Entering into written contract.** — It shall be the obligation of the city, county, fire district or other political subdivision through its proper

corporate authorities or their designees, to meet and confer in good faith with the representative or representatives of the bargaining agent within ten (10) days after receipt of written notice from said bargaining agent of the request by the firefighters for a meeting for collective bargaining purposes. This obligation shall include the duty to cause any agreement resulting from negotiations between the bargaining agent and the proper corporate authorities to be reduced to a written contract. [1970, ch. 138, § 4, p. 333; am. 1977, ch. 95 § 1, p. 200; am. 1996, ch. 206, § 1, p. 630.]

**Compiler's notes.** Section 2 of S.L. 1977, ch. 95 is compiled as § 44-1807.

Section 2 of S.L. 1996, ch. 206 declared an emergency. Approved March 12, 1996.

**Cited in:** International Ass'n of Firefighters Local No. 672 v. Boise City, 136 Idaho 162, 30 P.3d 940 (2001).

**44-1805. Submission of issues to fact finding commission.** — In the event that the bargaining agent and the corporate authorities are unable, within thirty (30) days from and including the date of their first meeting, to reach an agreement on a contract, any and all unresolved issues shall be submitted to a fact finding commission. [1970, ch. 138, § 5, p. 333.]

**Cited in:** Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

**44-1806. Appointment of fact-finding commission — Public officials and employees ineligible — Payment of expenses.** — Within five (5) days from the expiration of the thirty (30) day period referred to in section 44-1805, Idaho Code, the bargaining agent and the corporate authorities shall each select and name one (1) member of a fact-finding commission respectively and shall immediately thereafter notify each other in writing of the names and addresses of the person so selected. The two (2) members so selected and named shall within ten (10) days from and after the expiration of the five (5) day period mentioned above, agree upon and appoint and name a third member. If on the expiration of the ten (10) day period the two (2) members are unable to agree upon the appointment of a third member, the director of the department of labor shall appoint such third member upon request in writing from either the bargaining agent or the corporate authorities. The third member of the fact-finding commission, whether appointed as result of agreement between the two (2) members selected by the bargaining agent and the corporate authorities, or appointed by the director, shall act as chairman of the fact-finding commission. No member of the fact-finding commission shall be an elected official, or employee of the city, county, fire district, or political subdivision affected. Any expenses incurred by the fact-finding commission shall be equally shared by the bargaining agent and the corporate authorities. [1970, ch. 138, § 6, p. 333; am. 1996, ch. 421, § 21, p. 1406.]

**Compiler's notes.** The name of the commissioner of labor has been changed to the director of the department of labor and indus-

trial services on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 39, § 3 (§ 44-102 (now repealed)).



Sections 20 and 22 of S.L. 1996, ch. 421 are compiled as §§ 44-1508 and 28-45-104, respectively.

**44-1807. Negotiated agreements constitute contract.** — Any agreements actually negotiated between the bargaining agent and the corporate authorities either before or within thirty (30) days after the fact finding commission's recommendation shall constitute the collective bargaining contract governing the fire fighters and said city, county, fire district, or political subdivision for the period stated therein. [1970, ch. 138, § 7, p. 333; am. 1977, ch. 95, § 2, p. 200.]

**Compiler's notes.** Section 1 of S.L. 1977, ch. 95 is compiled as § 44-1804.

**44-1808. Notice of request for bargaining on matters requiring appropriation.** — Whenever wages, rates of pay, or any other matter requiring appropriation of money by any city, county, fire district or political subdivision are included as a matter of collective bargaining conducted under the provisions of this act, it is the obligation of the bargaining agent to serve written notice of request for collective bargaining on the corporate authorities at least ninety (90) days before the last day on which money can be appropriated by the city, county, fire district or political subdivision to cover the contract period which is the subject of the collective bargaining procedure. [1970, ch. 138, § 8, p. 333.]

**Compiler's notes.** For words "this act" see Compiler's note, § 44-1801.

**44-1809. Notice of hearing before fact finding commission — Presentation of evidence — Determination by majority.** — (a) The fact finding commission shall appoint a time and place for hearing and cause notification to the parties consisting of the bargaining agent and the corporate authorities to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice requirement. The fact finding commission may adjourn the hearing from time to time as necessary, and on request of a party for good cause, or upon their own motion, may postpone the hearing. The fact finding commission may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

(b) All interested parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the members of the fact finding commission but a majority may determine any question and render a recommendation. If, during the course of the hearing a member of the fact finding commission for any reason ceases to act or serve on said commission, the remaining members appointed to act may continue with the hearing and determination of the controversy. [1970, ch. 138, § 9, p. 333.]



**44-1810. Written recommendation of commission — Copies to parties.** — The recommendation of the fact finding commission shall be in writing and signed by the members joining in the recommendation. The fact finding commission shall deliver a copy of the recommendation to the bargaining agent, corporate authorities, and any other party requesting such recommendation. [1970, ch. 138, § 10, p. 333.]

**44-1811. Strikes prohibited during contract.** — Upon consummation and during the term of the written contract or agreement, no firefighter shall strike or recognize a picket line of any labor organization while in the performance of his official duties. [1970, ch. 138, § 11, p. 333.]

**Compiler's notes.** Section 12 of S.L. 1970, ch. 138 declared an emergency. Approved March 9, 1970.

**Prohibition of Strikes.**

The express prohibition of strikes by this section does not support the inference that the legislature must have intended to permit strikes by public school employees or it would have expressly prohibited such strikes as it did those by fire fighters. School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977).

By expressly prohibiting strikes by firefighters during the term of a contract, the legislature either impliedly recognized their

right to strike after expiration of the contract or, at a minimum, opened the door to such contractual agreement as the parties might reach in that regard. Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

Strikes are prohibited after consummation and during the term of a written contract, but in that period of time after the old contract expires and before the new one is consummated, they are not prohibited and the parties are free to negotiate one way or another depending upon their relative economic strengths. Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

**44-1812. Minimum standards for employing paid firefighters. —**

(1) No person may be employed as a paid firefighter as defined in sections 44-1801(1) and 59-1391(f), Idaho Code, until that person:

- (a) Has met and has been certified by the examining physician selected by the corporate authority as having met the minimum medical and health standards set forth in subsection (4) of this section;
- (b) Is at least eighteen (18) years of age at the time of appointment; and
- (c) Has met prescribed physical performance standards as adopted by the corporate authority.

(2) A true copy of the medical history of the applicant, completed and signed by the examining physician shall be sent to the corporate authority. Such records shall be furnished prior to the date of active employment of the applicant. If an applicant fails to meet the requirements of subsection (1) of this section, the applicant shall not be eligible for employment and the corporate authority shall provide notice of ineligibility to the applicant.

(3) Physical examination records shall be a part of the permanent file of the corporate authority.

(4) For purposes of this section, the phrase "minimum medical and health standards" shall mean the preplacement medical evaluation provisions of chapter 2-3 of the 1997 edition of NFPA 1582, the standard on medical requirements for firefighters published by the national fire protection association. The cost of the medical examination contemplated by this section is to be paid by the corporate authority, which shall make copies of NFPA 1582 available upon request.

(5) Nothing in this section shall apply to paid firefighters who are employed as such before October 1, 1980, as long as they continue in such employment; nor to promotional appointments after becoming a member of a fire department of any corporate authority; nor to the reemployment of a paid firefighter by the same or a different corporate authority within two (2) years after the termination of his employment; nor to the reinstatement of a paid firefighter who has been on military or disability leave, disability retirement status, or who was terminated because of a reduction in force or leave of absence status. [I.C., § 72-1428, as added by 1974, ch. 59, § 2, p. 1136; am. 1976, ch. 316, § 1, p. 1084; am. 1977, ch. 97, § 1, p. 202; am. 1980, ch. 50, § 23, p. 79; am. 1983, ch. 90, § 1, p. 187; am. 1984, ch. 242, § 1, p. 588; am. and redesisg. 1989, ch. 66, § 1, p. 105; am. 1995, ch. 188, § 1, p. 675; am. and redesisg. 1996, ch. 421, § 15, p. 1406; am. 1999, ch. 50, § 2, p. 112.]

**Compiler's notes.** This section which was formerly compiled as § 72-1428, was amended and redesignated as § 44-109 by § 1 of S.L. 1989, ch. 66, and was subsequently amended and redesignated as this section by § 15 of S.L. 1996, ch. 421.

Section 24 of S.L. 1980, ch. 50 is compiled as § 72-1446.

Section 14 of S.L. 1996, ch. 421 is compiled as § 72-1385, § 16 contained a repeal and § 17 is compiled as 44-1505.

Sections 1 and 3 of S.L. 1999, ch. 50, are compiled as §§ 44-1801 and 72-1333, respectively.

Section 46(2) of S.L. 1980, ch. 50 read: "(2) So much of section 72-1428, Idaho Code, as amended by section 23 of this act, as relates to the requirement that the public employee

retirement system board adopt rules and regulations shall be in full force and effect on and after July 1, 1980, but the rules adopted by the board shall have no effect until October 1, 1980, and the balance of section 72-1428, Idaho Code, shall be in full force and effect on and after October 1, 1980."

Section 2 of S.L. 1976, ch. 316 declared an emergency and provided the act should be in full force and effect on and after approval. Approved April 1, 1976. Law without governor's signature, March 31, 1976.

Section 2 of S.L. 1977, ch. 97 declared an emergency. Approved March 17, 1977.

Section 2 of S.L. 1983, ch. 90 declared an emergency. Approved March 29, 1983.

Section 4 of S.L. 1999, ch. 50 declared an emergency. Approved March 11, 1999.

## CHAPTER 19

### SANITATION FACILITIES FOR FARM WORKERS

#### SECTION.

44-1901. Statement of intent.

44-1902. Definitions.

44-1903. Furnishing of toilet facilities.

#### SECTION.

44-1904. Retaliatory actions.

44-1905. Violation — Penalty — Misdemeanor.

**44-1901. Statement of intent.** — It is hereby declared that the legislature of the state of Idaho, by the passage of this act, recognizes that the provision of toilet facilities for workers working in fields in the growing and harvesting of crops is necessary to preserve sanitation and health and that the provision of these basic facilities is also necessary for the privacy and dignity of such workers. [I.C., § 44-1901, as added by 1981, ch. 256, § 1, p. 547.]

**Compiler's notes.** The words "this act" refer to S.L. 1981, ch. 256, which is compiled as §§ 44-1901 — 44-1905.



**44-1902. Definitions.** — As used in this chapter, the following terms have the following meanings:

(1) "Farm operation" means any activity by which a crop is planted, grown, tended, cultivated or harvested, in which eight (8) or more workers are working as a crew, unit or group for a period of four (4) or more hours.

(2) "Farm operator" means any individual, partnership, corporation, or other legal entity, or any officer or agent acting on behalf of such individual, partnership, corporation, or legal entity, which is the owner in possession, or lessee of, a farming operation, or which is responsible for its management condition.

(3) "Farm labor contractor" means any person who, for a fee, furnishes workers to a farm operator.

(4) "Reasonable distance" means a distance within one-quarter ( $\frac{1}{4}$ ) mile or less of the place of work. When, because of the layout of access roads, ground terrain, or other physical conditions, it is not possible to comply with the foregoing requirement, toilet facilities shall be located at the point of vehicular access closest to the workers.

(5) "Toilet facility" means a facility, including a portable facility, which contains a toilet designed to provide privacy, to prevent contamination of crops and adjoining water supplies. [I.C., § 44-1902, as added by 1981, ch. 256, § 1, p. 547.]

**44-1903. Furnishing of toilet facilities.** — On any farm operation, the farm operator, or when workers are furnished by a farm labor contractor, the farm labor contractor, shall provide and maintain at least one (1) toilet facility in a clean and sanitary condition for every forty (40) workers, or fraction thereof, within a reasonable distance of where the workers are working. For farm operations employing fewer than forty (40) workers, at least one (1) toilet facility shall be provided. [I.C., § 44-1903, as added by 1981, ch. 256, § 1, p. 547.]

**44-1904. Retaliatory actions.** — No farm operator or farm labor contractor may discharge or in any manner retaliate against any worker because the worker has instituted or is about to institute any proceedings under this chapter, or has testified, or is about to testify, in any proceedings under or related to the provisions of this chapter. [I.C., § 44-1904, as added by 1981, ch. 256, § 1, p. 547.]

**44-1905. Violation — Penalty — Misdemeanor.** — Any farm operator or farm labor contractor who willfully or negligently violates section 44-1903, Idaho Code, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than three hundred dollars (\$300) for each violation. [I.C., § 44-1905, as added by 1981, ch. 256, § 1, p. 547.]



## CHAPTER 20

## RIGHT TO WORK

## SECTION.

44-2001. Declaration of public policy.

44-2002. Labor organization.

44-2003. Freedom of choice guaranteed, discrimination prohibited.

44-2004. Voluntary payments protected.

44-2005. Agreements in violation, and actions to induce such agreements, declared illegal.

## SECTION.

44-2006. Coercion and intimidation prohibited.

44-2007. Penalties.

44-2008. Civil remedies.

44-2009. Duty to investigate.

44-2010. Prospective application.

44-2011. Applicability.

44-2012. Severability.

**44-2001. Declaration of public policy.** — It is hereby declared to be the public policy of the state of Idaho, in order to maximize individual freedom of choice in the pursuit of employment and to encourage an employment climate conducive to economic growth, that the right to work shall not be subject to undue restraint or coercion. The right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization or on refusal to join, affiliate with, or financially or otherwise support a labor organization. [I.C., § 44-2001, as added by 1985, ch. 2, § 1, p. 4.]

**Compiler's notes.** Sections 44-2001 — 44-2010, and 44-2012 which were added in 1985 were the subject of a referendum to approve the sections voted on at the general election, November 4, 1986. Such referendum passed by a vote of 208,248 for and 177,069 against.

**Effective Date.**

The legislature of this state is authorized by Const., Art. 3, § 22, to declare an emergency and thereby render an act effective immediately upon its passage; the people of

this state are statutorily authorized by § 34-1803 to approve or reject that legislation at the next biennial election. Hence, H.B. 2 (Acts 1985, ch. 2; §§ 44-2001 — 44-2011), designated as an emergency bill by the legislature, was effective immediately and would continue to be effective until the next biennial election, and thereafter only if approved by the voters. *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 718 P.2d 1129 (1986).

**44-2002. Labor organization.** — The term "labor organization" means any organization of any kind, or agency or employee representation committee or union, which exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of work, other conditions of employment, or other forms of compensation. [I.C., § 44-2002, as added by 1985, ch. 2, § 1, p. 4.]

**44-2003. Freedom of choice guaranteed, discrimination prohibited.** — No person shall be required, as a condition of employment or continuation of employment, (1) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization, or, (2) to become or remain a member of a labor organization, or, (3) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization, or, (4) to pay to any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization, or, (5) to be recommended,

approved, referred, or cleared by or through a labor organization. [I.C., § 44-2003, as added by 1985, ch. 2, § 1, p. 4.]

**44-2004. Voluntary payments protected.** — (1) It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the employer.

(2) Deductions for political activities as defined in chapter 26, title 44, Idaho Code, shall not be deducted from the wages, earnings or compensation of an employee.

(3) Nothing in this chapter shall prohibit an employee from personally paying contributions for political activities as defined in chapter 26, title 44, Idaho Code, to a labor organization unless such payment is prohibited by law. [I.C., § 44-2004, as added by 1985, ch. 2, § 1, p. 4; am. 2003, ch. 97, § 2, p. 311.]

**Compiler's notes.** Section 1 of S.L. 2003, ch. 97, is compiled as §§ 44-2601 — 44-2605 and section 3 is compiled as § 67-6005. **Sec. to sec. ref.** This section is referred to in § 67-6605.

**44-2005. Agreements in violation, and actions to induce such agreements, declared illegal.** — Any agreement, understanding or practice, written or oral, implied or expressed, between any labor organization and employer which violates the rights of employees as guaranteed by provisions of this chapter is hereby declared to be unlawful, null and void, and of no legal effect. Any strike, picketing, boycott, or other action by a labor organization for the sole purpose of inducing or attempting to induce an employer to enter into any agreement prohibited under this chapter is hereby declared to be for an illegal purpose and is a violation of the provisions of this chapter. [I.C., § 44-2005, as added by 1985, ch. 2, § 1, p. 4.]

**44-2006. Coercion and intimidation prohibited.** — It shall be unlawful for any person, labor organization, or officer, agent or member thereof, or employer, or officer or agent thereof, by any threatened or actual intimidation of an employee or prospective employee or his parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to his property, to compel or attempt to compel such employee to join, affiliate with, or financially support a labor organization or to refrain from doing so, or to otherwise forfeit his rights as guaranteed by provisions of this chapter. It shall also be unlawful to cause or attempt to cause such employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employee. [I.C., § 44-2006, as added by 1985, ch. 2, § 1, p. 4.]



**44-2007. Penalties.** — Any person who directly or indirectly violates any provision of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine not exceeding one thousand dollars (\$1,000) or imprisonment for a period of not more than ninety (90) days, or both such fine and imprisonment. [I.C., § 44-2007, as added by 1985, ch. 2, § 1, p. 4.]

**44-2008. Civil remedies.** — Any employee injured as a result of any violation or threatened violation of the provisions of this chapter shall be entitled to injunctive relief against any and all violators or persons threatening violations and may in addition thereto recover any and all damages, including costs and reasonable attorney fees, of any character resulting from such violation or threatened violation. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this chapter. [I.C., § 44-2008, as added by 1985, ch. 2, § 1, p. 4.]

**44-2009. Duty to investigate.** — It shall be the duty of the prosecuting attorneys of each county and of the attorney general of this state, to investigate complaints of violation or threatened violations of this chapter and to prosecute all persons violating any of its provisions, and to take all means at their command to ensure its effective enforcement. [I.C., § 44-2009, as added by 1985, ch. 2, § 1, p. 4.]

**44-2010. Prospective application.** — The provisions of this chapter shall apply to all contracts entered into after the effective date [January 31, 1985] of this chapter and shall apply to any renewal or extension of any existing contract. [I.C., § 44-2010, as added by 1985, ch. 2, § 1, p. 4.]

**44-2011. Applicability.** — The provisions of this chapter are applicable to all employment, private and public, including all employees of the state and its political subdivisions. [I.C., § 44-2011, as added by 1995, ch. 178, § 2, p. 662.]

**Compiler's notes.** Former § 44-2011 was amended and redesignated as § 44-2012 by § 1 of S.L. 1995, ch. 178.

**44-2012. Severability.** — The provisions of this chapter are hereby declared to be severable, and if any provision is declared void, invalid, or unenforceable in whole or in part, such declaration shall not affect the remaining provisions of this chapter. [I.C., § 44-2011, as added by 1985, ch. 2, § 1, p. 4; am. and redesignig. 1995, ch. 178, § 1, p. 662.]

**Compiler's notes.** This section was formerly compiled as § 44-2011.

Section 2 of S.L. 1985, ch. 2 declared an

emergency. Became law upon legislative override of governor's veto, January 31, 1985.



## CHAPTER 21

## MANUFACTURED HOME DEALER AND BROKER LICENSING

## SECTION.

44-2101. Purpose — License required.

44-2101A. Definitions.

44-2102. Administration — Powers and duties.

44-2102A. [Repealed.]

44-2103. Fees — Deposit of fees.

44-2104. Manufactured home advisory board.

## SECTION.

44-2105. Suspension or revocation of licenses  
— Hearing — Judicial review  
— Reapplication.

44-2106. Violations.

44-2107. Penalty provisions.

**44-2101. Purpose — License required.** — The legislature finds that the regulation and control of those persons engaged in the business of manufacturing, selling, installing or servicing of manufactured homes is necessary to protect the health and safety of the citizens of Idaho. To that end, it shall be unlawful for any person to engage in business as a manufacturer of manufactured homes, a manufactured home dealer, manufactured home broker, manufactured home service company or a manufactured home salesman without being duly licensed as provided in this chapter. [I.C., § 44-2101, as added by 1993, ch. 372, § 1, p. 1339.]

**Compiler's notes.** Former § 44-2101 was amended and redesignated as § 44-2101A by § 2 of S.L. 1993, ch. 372.

**Sec. to sec. ref.** This chapter is referred to in § 49-1608.

**44-2101A. Definitions.** — As used in this chapter:

(1) "Administrator" means the administrator of the division of building safety of the state of Idaho.

(2) "Manufactured home" means a structure as defined in section 39-4105, Idaho Code.

(3) "Manufactured home broker" means any person engaged in the business of selling or exchanging used units only, or who buys, sells, lists or exchanges three (3) or more used units in any one (1) calendar year, except as otherwise provided in this chapter.

(4) "Manufactured home dealer" means any person engaged in the business of selling or exchanging new and used units, or who buys, sells, lists or exchanges three (3) or more new and used units in any one (1) calendar year, except as otherwise provided in this chapter.

(5) "Manufactured home salesman" means any person employed by a manufactured home dealer or broker for a salary, commission or compensation of any kind to sell, list, purchase or exchange or to negotiate for the sale, listing, purchase or exchange of units, except as otherwise provided in this chapter.

(6) "Manufactured home service company" includes "manufactured home installer" and means any person other than a manufactured home dealer who provides service, setup, or both, of manufactured or mobile homes.

(7) "Manufacturer" means any person engaged in the business of manufacturing manufactured homes that are offered for sale, lease or exchange in the state of Idaho.

(8) "Mobile home" means a structure similar to a manufactured home, but built to a state mobile home code which existed prior to the Federal Manufactured Housing and Safety Standards Act (HUD Code).

(9) "Person" means a natural person, corporation, partnership, trust, society, club, association, or other organization.

(10) "Principal place of business" means an enclosed structure accessible and open to the public, at which the business is lawfully conducted in accordance with the terms of all applicable building codes, zoning and other land use regulatory ordinances, in which building the public may contact the dealer, broker or salesman, and at which place shall be kept and maintained the books, records and files necessary to conduct the business. There shall be displayed on the exterior a sign permanently affixed to the land or building with letters clearly visible to the major avenue of traffic.

(11) "Responsible managing employee" means the person designated by the employer to supervise other employees, either personally or through others.

(12) "Unit" means a mobile or manufactured home. [I.C., § 44-2101, as added by 1988, ch. 264, § 1, p. 519; am. 1989, ch. 21, § 1, p. 24; am. and redesign. 1993, ch. 372, § 2, p. 1339; am. 1996, ch. 421, § 28, p. 1406; am. 1997, ch. 228, § 1, p. 666; am. 2002, ch. 345, § 33, p. 963.]

**Compiler's notes.** This section was formerly compiled as § 44-2101.

The Federal Manufactured Housing and Safety Standards Act, referred to in subsection (8), is compiled as 42 U.S.C. § 5401 et seq.

The words in parentheses so appeared in the law as enacted.

Section 3 of S.L. 1993, ch. 372 is compiled as § 44-2103.

Section 27 of S.L. 1996, ch. 421 is compiled as § 39-4105.

Section 2 of S.L. 1997, ch. 228 is compiled as § 44-2202.

Sections 32 and 34 contains repeal of ch. 33, title 44 and is compiled as § 56-701A, respectively.

Section 30 of S.L. 1988, ch. 264 provided that the act should take effect on and after January 1, 1989.

**Cited in:** In re Peters, 168 Bankr. 710 (Bankr. D. Idaho 1994).

**Collateral References.** What is "mobile home," "house trailer," "trailer house," or "trailer" within meaning of restrictive covenant. 83 A.L.R.5th 651.

**44-2102. Administration — Powers and duties.** — The administrator is charged with the administration of the provisions of this chapter and shall:

(1) In accordance with the provisions of chapter 52, title 67, Idaho Code, promulgate, adopt, amend, and repeal rules for the establishment of a mandatory statewide manufactured home "setup" code. The administrator shall also define and prohibit any practice which is found to be deceptive.

(2) Prescribe the form and content of a new manufactured home buyer's information and disclosure form. Unless otherwise provided by the administrator, the form shall be presented by manufactured home dealers to each purchaser of a new manufactured home, and shall be executed by the dealer and purchaser at the time the initial purchase order is signed for the sale of a new manufactured home.

(3)(a) A used unit which has been determined to be or declared by the owner to be real property under the provisions of section 63-304, Idaho Code, may be offered for sale, listed, bought for resale, negotiated for,



either directly or indirectly, by a licensed real estate broker or a real estate salesman representing a licensed broker, but not a manufactured home dealer or manufactured home salesman.

(b) A used unit which has been determined to be and is carried on the tax rolls as personal property may be offered for sale, listed, bought for resale, negotiated for, either directly or indirectly, by a licensed real estate broker or a real estate salesman, pursuant to chapter 20, title 54, Idaho Code, or by a licensed manufactured home dealer, broker, or manufactured home salesman, but with respect to a licensed manufactured home dealer, broker or salesman only to the extent such sale does not involve the purchase or sale of an interest in real estate.

(c) A licensed real estate broker or real estate salesman representing a licensed broker pursuant to chapter 20, title 54, Idaho Code, may participate in new manufactured home sales that include real estate if the real estate broker or salesman has a valid, written agreement with a licensed manufactured home dealer to represent the interests of the manufactured home dealer in this type of transaction. [I.C., § 44-2102, as added by 1988, ch. 264, § 1, p. 519; am. 1990, ch. 165, § 1, p. 362; am. 1996, ch. 322, § 43, p. 1029; am. 1996, ch. 421, § 29, p. 1406; am. 1997, ch. 107, § 1, p. 251; am. 1999, ch. 171, § 1, p. 461; am. 2000, ch. 439, § 1, p. 1398.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 439 is compiled as 44-2104.

Sections 42 and 44 of S.L. 1996, ch. 32 are compiled as §§ 43-717 and 44-2206 (now repealed), respectively.

**Collateral References.** What is "mobile home," "house trailer," "trailer house," or "trailer" within meaning of restrictive covenant. 83 A.L.R.5th 651.

## 44-2102A. Exceptions to chapter. [Repealed.]

**Compiler's notes.** This section, which comprised I.C., § 44-2102A, as added by 1989, ch. 21, § 2, p. 24, was repealed by S.L. 1990, ch. 165, § 2.

**44-2103. Fees — Deposit of fees. —** (1) Fees for licensing of dealers, brokers, manufacturers, salesmen and service companies shall not exceed:

- (a) Manufactured home dealer or broker's license ..... \$250.00
- (b) Manufacturer license ..... \$250.00
- (c) Manufactured home service company/installer ..... \$125.00
- (d) Manufactured home salesman's license ..... \$ 25.00

(2) All license fees collected by the division of building safety under the provisions of this chapter shall be paid into the manufactured housing account, which is hereby created in the dedicated fund. The expenses incurred in administering and enforcing the provisions of this chapter shall be paid from the account.

(3) The following performance bonding requirements shall be met before the issuance of these licenses:

- (a) Manufacturer ..... \$20,000 bond
- (b) Manufactured home dealer ..... \$20,000 bond
- (c) Manufactured home broker ..... \$20,000 bond
- (d) Manufactured home service company/installer ..... \$ 5,000 bond



(4) The administrator is authorized to provide by rule, in accordance with the provisions of section 44-2102, Idaho Code, for the acceptance of a money deposit in lieu of a bond in satisfaction of the bonding requirements of this section.

(5) Fees and bond requirements of this section shall be the exclusive fee and bond requirements for dealers, brokers, manufacturers, salesmen and service companies governed by the provisions of this chapter, and shall supersede any program of any political subdivision of the state which sets fee or bond requirements for the same services.

[I.C., § 44-2103, as added by 1988, ch. 264, § 1, p. 519; am. 1993, ch. 372, § 3, p. 1339; am. 1995, ch. 202, § 1, p. 694; am. 1996, ch. 171, § 1, p. 554; am. 1996, ch. 421, § 30, p. 1406.]

**Compiler's notes.** This section was amended by two 1996 acts — ch. 171, § 1, effective July 1, 1996, and ch. 421, § 30, effective July 1, 1996 — which do not appear to conflict and have been compiled together.

The amendment by ch. 171, § 1, added subdivision (5).

The amendment by ch. 421, § 30 substituted

“division of building safety” for “department” in subdivision (2) and “administrator” for “director” in subdivision (4).

Section 2 of S.L. 1993, ch. 372 is compiled as § 44-2101A and § 4 contained a repeal.

**Sec. to sec. ref.** This section is referred to in § 49-1608.

**44-2104. Manufactured home advisory board.** — (1) A manufactured home advisory board is established in the division of building safety to advise the administrator in the administration and enforcement of the provisions of this chapter. The board shall consist of five (5) members, appointed by the governor, four (4) of whom shall be from licensed manufactured home dealers and one (1) of whom shall be a consumer who lives in a manufactured home. The board shall serve the following terms commencing January 1, 1989: two (2) members shall be appointed for a term of one (1) year, two (2) members shall be appointed for a term of two (2) years, and one (1) member shall be appointed for a term of three (3) years. The consumer member shall be a member appointed to a term beginning on January 1, 1996, or as soon thereafter as there is a vacancy on the board. Thereafter board members shall be appointed for a term of three (3) years. Not more than three (3) members shall at any time belong to the same political party. Whenever a vacancy occurs, the governor shall appoint a qualified person to fill the vacancy for the unexpired portion of the term. The members of the board shall be compensated as provided in section 59-509(n), Idaho Code, for each day spent in attendance at meetings of the board. A majority of members shall constitute a quorum, and a quorum at any meeting called by the administrator shall have full and complete power to act upon and resolve in the name of the board any matter, thing or question referred to it by the administrator, or which by reason of any provision of this chapter, it has the power to determine.

(2) The board shall, on the first day of each January or as soon thereafter as practicable, elect a chairman, vice chairman and secretary from among its members, and these officers shall hold office until their successors are elected. As soon as the board has elected its officers, the secretary shall certify the results of the election to the administrator. The chairman shall

preside at all meetings of the board and the secretary shall make a record of the proceedings which shall be preserved in the offices of the division of building safety. If the chairman is absent from any meeting of the board, his duties shall be discharged by the vice chairman. All members of the board present at a meeting shall be entitled to vote on any question, matter, or thing which properly comes before it.

(3) The board shall have the authority to promulgate rules in accordance with chapter 52, title 67, Idaho Code, to implement the provisions of this chapter. [I.C., § 44-2104, as added by 1988, ch. 264, § 1, p. 519; am. 1996, ch. 334, § 1, p. 1131; am. 1996, ch. 421, § 31, p. 1406; am. 2000, ch. 439, § 2, p. 1398; am. 2001, ch. 151, § 2, p. 546.]

**Compiler's notes.** This section was amended by two 1996 acts — ch. 334, § 1, effective March 18, 1996, and ch. 421, § 31, effective July 1, 1996 — which do not appear to conflict and have been compiled together.

The amendment by ch. 334, § 1, in subsection (1), in the first sentence deleted “as a complaint and appeals board and” preceding “to advise the”, in the second sentence added “, four (4) of whom shall be” following “by the governor” and added “and one (1) of whom shall be a consumer who lives in a manufactured home” following “manufactured home

dealers”, and added the present fourth sentence.

The amendment by ch. 421, § 31, substituted “division of building safety” for “department” and substituted “administrator” for “director” throughout the section.

Section 1 of S.L. 2000, ch. 439 is compiled as 44-2102.

Sections 1 and 3 of S.L. 2001, ch. 151, are compiled as §§ 39-4106 and 54-1006, respectively.

Section 2 of S.L. 1996, ch. 334 declared an emergency. Approved March 18, 1996.

**44-2105. Suspension or revocation of licenses — Hearing — Judicial review — Reapplication.** — (1) The administrator may suspend or revoke any license, if the license was obtained through error or fraud, or if the holder thereof is shown to be grossly incompetent, or has wilfully violated any provision of this chapter or the rules adopted thereunder.

(2) The administrator shall have the power to appoint, by an order in writing, any competent person to take testimony at a hearing conducted for the purposes of determining whether a license should be suspended or revoked. The administrator, and any hearing officer appointed by the administrator, shall have the power to administer oaths, issue subpoenas and compel the attendance of witnesses and the production of documents and records.

(3) Before any license shall be suspended or revoked, the holder thereof shall be served with written notice enumerating the charges against him, and shall be afforded an opportunity for an appropriate contested case in accordance with the provisions of chapter 52, title 67, Idaho Code. The notice shall specify the time and place for hearing, which time shall not be less than five (5) days after the service thereof.

(4) Any party aggrieved by an order of the administrator suspending or revoking a license shall be entitled to judicial review thereof in accordance with the provisions of chapter 52, title 67, Idaho Code.

(5) Any person whose license has been revoked may not apply for a new license until the expiration of one (1) year from the date of such revocation. [I.C., § 44-2105, as added by 1993, ch. 372, § 5, p. 1339; am. 1996, ch. 421, § 32, p. 1406.]



**Compiler's notes.** Former § 44-2105, 1988, ch. 264, § 1, p. 519, was repealed by which comprised I.C., § 44-2105, as added by S.L. 1993, ch. 372, § 4, effective July 1, 1993.

**44-2106. Violations.** — (1) It shall be unlawful to engage in business as a manufacturer, manufactured home dealer, manufactured home broker, manufactured home salesman or manufactured home service company without being duly licensed by the division of building safety pursuant to this chapter.

(2) It shall be unlawful for a manufacturer, manufactured home dealer, manufactured home broker, manufactured home salesman or manufactured home service company to:

(a) Intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular or which misrepresents any of the products or services sold or provided by a manufacturer, manufactured home dealer, broker, salesman or service company;

(b) Violate any of the provisions of this chapter or any rule adopted by the division of building safety pursuant to this chapter;

(c) Knowingly purchase, sell or otherwise acquire or dispose of a stolen manufactured or mobile home;

(d) With respect only to a manufactured home dealer or broker, to engage in the business for which such dealer or broker is licensed without at all times maintaining a principal place of business located within the state. [I.C., § 44-2106, as added by 1993, ch. 372, § 6, p. 1339; am. 1996, ch. 421, § 33, p. 1406.]

**Compiler's notes.** Former § 44-2106 was amended and redesignated as § 44-2107 by § 7 of S.L. 1993, ch. 372.

Section 34 of S.L. 1996, ch. 421 is compiled as § 45-601.

**44-2107. Penalty provisions.** — Whoever shall violate any of the provisions of this chapter, or any laws or rules adopted pursuant to this chapter, shall be guilty of a misdemeanor. [I.C., § 44-2106, as added by 1988, ch. 264, § 1, p. 519; am. and redesign. 1993, ch. 372, § 7, p. 1339.]

**Compiler's notes.** This section was formerly compiled as § 44-2106.

Section 2 of S.L. 1988, ch. 264 is compiled as §§ 44-2201 — 44-2205 (now repealed).

Section 8 of S.L. 1993, ch. 372 is compiled as § 44-2201.

Section 30 of S.L. 1988, ch. 264 provided that the act should take effect on and after January 1, 1989.

## CHAPTER 22

### MANUFACTURED HOME INSTALLATION STANDARD

#### SECTION.

44-2201. Mobile/manufactured homes installation.

44-2202. Installation permits and inspections required.

44-2203 — 44-2205. Manufacturer's instructions on stabilizing system

#### SECTION.

may be used — Requirements for installing stabilizing systems — Requirements for permanent foundations. [Repealed.]

44-2206. [Repealed.]

**44-2201. Mobile/manufactured homes installation.** — (1) All mobile/manufactured homes must be installed in accordance with the Idaho manufactured home installation standard, as provided by rule pursuant to this chapter. All mobile/manufactured homes must be installed in accordance with all other applicable state laws or rules pertaining to utility connection requirements.

(2) The administrator of the division of building safety may promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, specifying standardized installation instructions for mobile/manufactured homes. Upon the effective date of such rules, the rules shall prevail over any conflicting provisions in this chapter. [I.C., § 44-2201, as added by 1988, ch. 264, § 2, p. 519; am. 1993, ch. 372, § 8, p. 1339; am. 1998, ch. 237, § 1, p. 794; am. 2001, ch. 96, § 2, p. 243.]

**Compiler's notes.** Section 1 of S.L. 1988, ch. 264 is compiled as §§ 44-2101 — 44-2106. Section 7 of S.L. 1993, ch. 372 is compiled as § 44-2107.

Section 30 of S.L. 1988, ch. 264 provided that the act should take effect on and after January 1, 1989.

Section 5 of S.L. 2001, ch. 96 declared an emergency. Approved March 22, 2001.

**Sec. to sec. ref.** This section is referred to in § 55-2007.

**44-2202. Installation permits and inspections required.** — (1) The owner or the installer of a mobile/manufactured home must obtain an installation permit as required by city or county ordinance before installing a mobile/manufactured home that will be used as a residence on a building site or in a park. The installer's license must be in effect at the time of the application for the installation permit.

(2) Cities and counties, which have by ordinance adopted a building code, shall establish a permit process for the installation of all mobile/manufactured homes within their respective jurisdictions and shall provide for inspection of all work in accordance with the Idaho manufactured home installation standard. Fees for installation permits and inspections shall be as established by the city or county having jurisdiction.

(3) Immediately upon completion of the installation of a mobile or manufactured home, a licensed installer or the responsible managing employee of the licensed installer shall perform an inspection of the completed installation to ensure compliance with the Idaho manufactured home installation standard. Such inspection shall be recorded on an inspection record document approved by the division and a copy shall be provided to the homeowner upon completion of the inspection. [I.C., § 44-2202, as added by 1988, ch. 264, § 2, p. 519; am. 1993, ch. 372, § 9, p. 1339; am. 1997, ch. 228, § 2, p. 666; am. 2001, ch. 96, § 3, p. 243.]

**Compiler's notes.** Section 10 of S.L. 1993, ch. 372 is compiled as § 44-2204 (now repealed).

Section 1 of S.L. 1997, ch. 228 is compiled as § 44-2101A.

Section 4 of S.L. 2001, ch. 96 contained repeals.

Section 5 of S.L. 2001, ch. 96 declared an emergency. Approved March 22, 2001.

**Sec. to sec. ref.** This section is referred to in § 44-2502.



**44-2203 — 44-2205. Manufacturer's instructions on stabilizing system may be used — Requirements for installing stabilizing systems — Requirements for permanent foundations. [Repealed.]**

**Compiler's notes.** The following sections were repealed by S.L. 2001, ch. 96, § 4:

44-2203 which comprised I.C., § 44-2203, as added by 1988, ch. 264, § 2, p. 519.

44-2204 which comprised I.C., § 44-2204,

as added by 1988, ch. 264, § 2, p. 519; am. 1993, ch. 372, § 10, p. 1339.

44-2205 which comprised I.C., § 44-2205, as added by 1988, ch. 264, § 2, p. 519.

**44-2206. Installation of electrical service equipment. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 44-2206, as added by 1995, ch. 341, § 1, p. 1128; am. 1996, ch. 322, § 44,

p. 1029, was repealed by S.L. 2000, ch. 324, § 1, effective July 1, 2000.

## CHAPTER 23

### CONSTRUCTION STANDARDS FOR ENERGY CONSERVATION

#### SECTION.

44-2301 — 44-2305. [Repealed.]

44-2306. [Repealed.]

**44-2301 — 44-2305. Definitions — Adoption of energy-efficient construction standards — Administration, enforcement, certification, inspections and fees — Release from liability — Review. [Repealed.]**

**Compiler's notes.** The following sections were repealed by S.L. 2002, ch. 345, § 32:

44-2301 which comprised I.C., § 44-2301, as added by 1990, ch. 324, § 2, p. 884; am. 1995, ch. 292, § 1, p. 1025.

44-2302 which comprised I.C., § 44-2302, as added by 1990, ch. 324, § 2, p. 884; am. 1995, ch. 292, § 2, p. 1025.

44-2303 which comprised I.C., § 44-2303, as added by 1990, ch. 324, § 2, p. 884; am. 1995, ch. 292, § 3, p. 1025.

44-2304 which comprised I.C., § 44-2304, as added by 1990, ch. 324, § 2, p. 884; am. and redesign. 1995, ch. 292, § 5, p. 1025.

44-2305 which comprised I.C., § 44-2305, as added by 1995, ch. 292, § 6, p. 1025.

**44-2306. Idaho public utilities commission report. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 44-2306, as added by 1990,

ch. 324, § 2, p. 884, was repealed by S.L. 1995, ch. 292, § 4, effective July 1, 1995.

## CHAPTER 24

### IDAHO PROFESSIONAL EMPLOYER

#### SECTION.

44-2401. Short title.

44-2402. Purpose.

44-2403. Definitions.

44-2404. Exemptions.

#### SECTION.

44-2405. Minimum standards.

44-2406. Other law.

44-2407. Severability.

**44-2401. Short title.** — This act shall be known and may be cited as the "Idaho Professional Employer Recognition Act." [I.C., § 44-2401, as added by 1994, ch. 129, § 1, p. 287.]

**Sec. to sec. ref.** This chapter is referred to in § 72-102.

**44-2402. Purpose.** — The legislature recognizes the increased popularity of professional employer services to small Idaho businesses and, therefore, deems it necessary in the interest of public health, safety and welfare to recognize such business enterprises, set forth certain definitions, and provide statutory guidelines. [I.C., § 44-2402, as added by 1994, ch. 129, § 1, p. 287.]

**44-2403. Definitions.** — As used in this chapter:

(1) "Administration fee" means those charges made by the professional employer to the client over and above the cost of taxes, premiums, wages, state and federal withholdings or licensing procedures.

(2) "Assigned worker" is a person with an employment relationship with both the professional employer and the client.

(3) "Client" means a person who obtains its work force from another person through a professional employer arrangement.

(4) "Person" means an individual, an association, a company, a firm, a partnership or a corporation.

(5) "Professional employer arrangement" means an arrangement, under contract or otherwise, whereby:

(a) A professional employer assigns workers to perform services for a client;

(b) The arrangement is intended to be, or is, on-going rather than temporary in nature; and

(c) Employer responsibilities are in fact shared by the professional employer and the client for assigned workers.

(d) For the purposes of this chapter, a professional employer arrangement shall not include:

(i) Temporary employees;

(ii) Arrangements wherein a person, whose principal business activity is not entering into professional employer arrangements, shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended, and which does not hold itself out as a professional employer;

(iii) Arrangements for which a person assumes full responsibility for the product or service performed by such person or his agents and retains and exercises, both legally and in fact, a complete right of direction and control over the individuals whose services are supplied under such contractual arrangements, and such person and his agents perform a specified function for the client which is separate and divisible from the primary business or operations of the client.

(6) "Professional employer" means any person engaged in providing the services of employees pursuant to one (1) or more professional employer



arrangements or any person that represents itself to the public as providing services pursuant to a professional employer arrangement.

(7) "Temporary employee" means a worker employed by an organization which hires its own employees and assigns them to a third party to support or supplement the third party's work force in work situations such as employee absences, temporary skill shortages, seasonal workload conditions, and special assignments and projects. [I.C., § 44-2403, as added by 1994, ch. 129, § 1, p. 287.]

**Compiler's notes.** Section 414 (b) and (c) of the Internal Revenue Code referred to in paragraph (5) (d) (ii) of this section is com-

piled as 26 U.S.C., § 414 (b) and (c).

**Sec. to sec. ref.** This section is referred to in §§ 72-102 and 72-1366.

**44-2404. Exemptions.** — This chapter shall not apply to labor organizations or to any political subdivision of the state, the United States, and any programs or agencies thereof. A professional employer arrangement shall have no effect on existing collective bargaining agreements. [I.C., § 44-2404, as added by 1994, ch. 129, § 1, p. 287.]

**44-2405. Minimum standards.** — (1) Each professional employer shall, as a condition to being recognized by this chapter, agree to the following standards:

(a) Have a written contract between the client and the professional employer setting forth the responsibilities and duties of each party. The contract shall disclose to the client the services to be rendered, the respective rights and obligations of the parties, and provide that the professional employer:

(i) Reserves a right of direction and control over workers assigned to the client's location. However, the client may retain such sufficient direction and control over the assigned workers as is necessary to conduct the client's business and without which the client would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure, regulatory or statutory requirement of the client;

(ii) Assume responsibility for the withholding and remittance of payroll-related taxes and employee benefits from its own accounts, as long as the contract between the client and professional employer remains in force;

(iii) Retain authority to hire, terminate, discipline, and reassign assigned workers. However, the client, if it accepts the responsibility for its action, may have the right to accept or cancel the arrangement of any assigned worker.

(b) Give written notice of the general nature of the relationship between the professional employer and the client to the workers assigned to the client and the public at large. Such notice may be posted in a visible and conspicuous manner at the client's work site.

(2) It is anticipated that under this chapter professional employers will, from time to time, receive from client companies, moneys which represent assigned workers' wages, withholdings, taxes, and benefit plan payments.

Each professional employer shall keep in force, in the state of Idaho, a separate bank account or accounts for the purpose of keeping such money separate from the professional employer's operating funds. Assigned workers' wages, withholdings, taxes, and benefit plan payments shall be promptly paid from such trust accounts.

(3) A professional employer shall be considered an employer for purposes of withholding state income tax pursuant to section 63-3035, Idaho Code, to the same extent as the professional employer is an employer for withholding federal income taxes pursuant to the Internal Revenue Code. As long as the professional employer's contract with the client remains in force, the professional employer shall have a right to and shall perform the following responsibilities:

(a) Pay wages and collect, report and pay employment taxes from its trust accounts;

(b) Pay unemployment taxes as required in Idaho state unemployment laws, chapter 13, title 72, Idaho Code;

(c) Work with the client in securing and providing worker's compensation coverage for all of its assigned workers.

(4) A recognized professional employer shall be deemed the employer for the purposes of sponsoring and maintaining benefit and welfare plans for its assigned workers.

(5) Subject to any contrary provisions of the contract between the client and the professional employer, the professional employer arrangement that exists between a professional employer and its clients shall be interpreted for the purposes of sales tax on services, insurance and bonding as follows:

(a) A professional employer shall not be liable for the acts, errors or omissions of a client or of any assigned worker acting under the direction and control of a client. A client shall not be liable for the acts, errors or omissions of a professional employer or of any assigned worker of a professional employer acting under the direction and control of the professional employer. Nothing herein shall limit any contractual liability between the professional employer and the client, nor shall this subsection in any way limit the liabilities of any professional employer or client as defined elsewhere in this chapter;

(b) Workers assigned or contracted to a client by a professional employer are not deemed employees of the professional employer for purposes of general liability insurance, automobile insurance, fidelity bonds, surety bonds, employer's liability which is not covered by worker's compensation, or liquor liability insurance carried by the professional employer unless the employees are included by specific reference in the applicable employment arrangement contract, insurance contract or bond;

(c) If Idaho enacts a tax on services similar to the sales tax, the administration fee will be the amount which is taxed.

(6) The sale of professional employer arrangements in conformance with the provisions of this chapter shall not constitute the sale of insurance within the meaning of applicable Idaho law. [I.C., § 44-2405, as added by 1994, ch. 129, § 1, p. 287.]



**44-2406. Other law.** — Nothing in this chapter exempts a client of a professional employer company nor a worker assigned to a client by a professional employer from any other state, local or federal license or registration requirement. Any individual who must be licensed, registered or certified according to law and who is an assigned worker is deemed an employee of the client for purposes of the license, registration or certification. Except to the extent provided otherwise in the contract with a client, a professional employer is not liable for the general debts, obligations, loss of profits, business goodwill or other consequential special or incidental damages of a client with which it has entered into a professional employer arrangement. [I.C., § 44-2406, as added by 1994, ch. 129, § 1, p. 287.]

**44-2407. Severability.** — If any provisions of this chapter, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to that end the provisions of this chapter are severable. [I.C., § 44-2407, as added by 1994, ch. 129, § 1, p. 287.]

**Compiler's notes.** Section 2 of S.L. 1994, ch. 129 is compiled as § 72-1349D (now § 72-1349B).

## CHAPTER 25

### MOBILE HOME REHABILITATION

#### SECTION.

44-2501. Legislative intent.

44-2502. Application of chapter — Rehabilitation required — Certificate of compliance.

#### SECTION.

44-2503. Rehabilitation requirements.

44-2504. Rehabilitation form and checklist — Administrative fee — Rules.

**44-2501. Legislative intent.** — In order to ensure a continued supply of safe, affordable housing, the state of Idaho hereby adopts a rehabilitation program for existing mobile homes constructed prior to June 15, 1976, the effective date of the federal manufactured housing and safety standards act (HUD code), that are currently sited within Idaho or that may be brought into the state after the effective date of this act. It is legislative intent that the relocation and installation of these homes be approved when the rehabilitation on the home has been completed as required in this chapter and proof of compliance has been issued by the administrator of the division of building safety of the state of Idaho. [I.C., § 44-2501, as added by 1998, ch. 128, § 1, p. 478.]

**44-2502. Application of chapter — Rehabilitation required — Certificate of compliance.** — (1) This chapter shall apply to the installation of mobile homes constructed prior to June 15, 1976, within the jurisdiction of a city or county requiring an installation permit pursuant to section 44-2202, Idaho Code.

(2) Before a permit for the installation of the mobile home may be issued, the home must meet the rehabilitation requirements specified in this chapter and receive a certificate of compliance from the administrator of the division of building safety of the state of Idaho.

(3) Upon submission of the rehabilitation form required pursuant to section 44-2504, Idaho Code, and any other information required by the administrator to establish compliance with this chapter, the administrator shall issue a certificate of compliance to the homeowner. The certificate of compliance must be presented to the local jurisdiction before a permit for the installation of the home may be issued.

(4) Upon receipt of the certificate of compliance, the local jurisdiction shall issue the installation permit in the same manner as the permit would be issued with respect to a mobile/manufactured home for which rehabilitation is not required. No zoning or other ordinance or policy of the local jurisdiction prohibiting relocation or installation of a mobile home to which this chapter applies shall be effective to prohibit the relocation or installation of a mobile home for which a certificate of compliance has been issued in accordance with this chapter. [I.C., § 44-2502, as added by 1998, ch. 128, § 1, p. 478.]

**44-2503. Rehabilitation requirements.** — The mobile home shall meet the following rehabilitation requirements:

(1) A smoke detector (which may be a single station alarm device) shall be installed on any wall in a hallway or space communicating with each bedroom area and the living area on the living area side and, when located in a hallway, the detector shall be between the return air intake and the living area. Each smoke detector shall be installed in accordance with its listing and the top of the detector shall be located on a wall four (4) inches to twelve (12) inches below the ceiling. The detector may be battery-powered or may be connected to an electrical outlet box by a permanent wiring method into a general electrical branch circuit, without any switch between the over current protection device protecting the branch circuit and the detector.

(2) The walls, ceilings and doors of each compartment containing a gas-fired furnace or water heater shall be lined with five-sixteenth ( $\frac{5}{16}$ ) inch gypsum board, unless the door opens to the exterior of the home, in which case, the door may be all metal construction. All exterior compartments shall seal to the interior of the mobile home.

(3) Each room designated expressly for sleeping purposes shall have an exterior exit door or at least one (1) outside egress window or other approved exit device with a minimum clear dimension of twenty-two (22) inches and a minimum clear opening of five (5) square feet. The bottom of the exit shall not be more than thirty-six (36) inches above the floor.

(4) All electrical systems shall be tested for continuity to assure that metallic parts are properly bonded, tested for operation to demonstrate that all equipment is connected and in working order, and given a polarity check to determine that connections are proper. The electrical system shall be properly protected for the required amperage load. If the unit wiring is of



aluminum conductors, all receptacles and switches rated twenty (20) amperes or less directly connected to the aluminum conductors shall be marked CO/ALR. Exterior receptacles other than heat tape receptacles shall be of the ground fault circuit interrupter (GFI) type. Conductors of dissimilar metals (copper/aluminum or copper clad aluminum) must be connected in accordance with section 110-14 of the national electrical code.

(5) The mobile home's gas piping shall be tested with the appliance valves removed from the piping system and piping capped at those areas. The piping system shall withstand a pressure of at least six (6) inch mercury or three (3) psi gauge for a period of not less than ten (10) minutes without showing any drop in pressure. Pressure shall be measured with a mercury manometer or a slope gauge calibrated so as to read in increments of not greater than one-tenth ( $\frac{1}{10}$ ) pound or an equivalent device. The source of normal operating pressure shall be isolated before the pressure test is made. After the appliance connections are reinstalled, the piping system and connections shall be tested with line pressure of not less than ten (10) inches nor more than fourteen (14) inches water column air pressure. The appliance connections shall be tested for leakage with soapy water or a bubble solution. All gas furnaces and water heaters shall be vented to the exterior in accordance with chapter 9 of the uniform mechanical code.

(6) A full water or air pressure test will be performed on the mobile home's water and sewer system.

(a) Water piping shall be tested and proven tight under a water pressure not less than the working pressure under which it is to be used. The water used for tests shall be obtained from a potable source of supply. A fifty (50) pound per square inch (344.5kPa) air pressure may be substituted for the water test. In either method of test, the piping shall withstand a test without leaking for a period of not less than fifteen (15) minutes.

(b) A water test shall be applied to the drainage and vent system either in its entirety or in sections. If applied to the entire system, all openings in the piping shall be tightly closed, except at the highest opening, and the system filled with water to the point of overflow. If the system is tested in sections, each opening shall be tightly plugged except the highest opening of the section under the test and each section shall be filled with water, but no section shall be tested with less than a ten (10) foot (3m) head of water. In testing successive sections, at least the upper ten (10) feet (3m) of the next preceding section shall be tested, so that no joint or pipe in the structure, except the uppermost ten (10) feet (3m) of the system, shall have been submitted to a test of less than a ten (10) foot (3m) head of water. The water shall be kept in the system or in the portion under testing for at least fifteen (15) minutes before inspection starts. The system shall be tight at all points.

(7) All repairs or other work necessary to bring the mobile home into compliance with the requirements of this section shall be completed before a certificate of compliance may be issued. [I.C., § 44-2503, as added by 1998, ch. 128, § 1, p. 478.]

**44-2504. Rehabilitation form and checklist — Administrative fee — Rules. —** (1) The administrator of the division of building safety shall,

by rule, establish a mobile home rehabilitation form and checkoff list. The form shall be completed and signed by an authorized representative of an Idaho licensed manufactured home service company or installer or dealer holding an installer's license. Electrical, gas, water and sewer inspections and any necessary repairs must be performed by a person or company properly licensed and authorized to perform the work under Idaho law, with the person or company performing the inspections and repairs to be noted on the rehabilitation form. A properly completed rehabilitation form shall be presented to the division of building safety before a certificate of compliance may be issued.

(2) The administrator of the division of building safety may, by rule, establish an administrative fee to cover the costs of administering the provisions of this chapter.

(3) In addition to the rulemaking authority provided in this section, the administrator of the division of building safety may promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, deemed necessary to implement the provisions of this chapter. [I.C., § 44-2504, as added by 1998, ch. 128, § 1, p. 478.]

**Sec. to sec. ref.** This section is referred to in § 44-2502.

## CHAPTER 26

### VOLUNTARY CONTRIBUTIONS ACT

#### SECTION.

44-2601. Short title.

44-2602. Definitions.

44-2603. Limits on labor organization contributions.

#### SECTION.

44-2604. Criminal acts — Penalties.

44-2605. Registration — Disclosure.

**44-2601. Short title.** — This chapter shall be known as the "Voluntary Contributions Act." [I.C., § 44-2601, as added by 2003, ch. 97, § 1, p. 311.]

**Compiler's notes.** Section 5 of S.L. 2003, ch. 97 read: "SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the applica-

tion of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

**44-2602. Definitions.** — (1) As used in this chapter the following terms have the following meanings:

(a) "Ballot proposition" includes initiatives, referenda, proposed constitutional amendments, and any other items submitted to the voters for their approval or rejection.

(b) "Filing entity" means a candidate, officeholder, political committee, political party, and each other entity required to report contributions under chapter 66, title 67, Idaho Code.

(c) "Fund" means the separate segregated fund established by a labor organization for political purposes according to the procedures and requirements of this chapter.



(d)(i) "Labor organization" means any association or organization of employees, and any agency, employee representation committee, or plan in which employees participate that exists, in whole or in part, to advocate on behalf of employees about grievances, labor disputes, wages, rates of pay, hours of employment or conditions of employment.

(ii) Except as provided in subsection (1)(d)(iii) of this section, "labor organization" includes each employee association and union for employees of public and private sector employers.

(iii) "Labor organization" does not include organizations governed by the national labor relations act, 29 U.S.C. section 151, et seq. or the railway labor act, 45 U.S.C. section 151, et seq.

(e) "Political activities" means electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure.

(f) "Union dues" means dues, fees or other moneys required as a condition of membership in a labor organization.

(2) Other terms defined in chapter 66, title 67, Idaho Code, apply to this chapter. [I.C., § 44-2602, as added by 2003, ch. 97, § 1, p. 311; am. 2003, ch. 340, § 1, p. 916.]

**Compiler's notes.** Section 5 of S.L. 2003, ch. 97 read: "SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the applica-

tion of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

**44-2603. Limits on labor organization contributions.** — (1)(a) A labor organization may only make expenditures for political activities if the labor organization establishes a separate segregated fund that meets the requirements of this chapter.

(b) The labor organization shall ensure that:

(i) In soliciting contributions for the fund, the solicitor discloses, in clear and unambiguous language on the face of the solicitation, that contributions are voluntary and that the fund is a political fund and will be expended for political activities;

(ii) Union dues are not used for political activities, transferred to the fund, or intermingled in any way with fund moneys;

(iii) The cost of administering the fund is paid from fund contributions and not from union dues; and

(iv) Each contribution is voluntary and shall be made by the member and may not come from or be remitted by the employer of the member.

(2) At the time the labor organization is soliciting contributions for the fund from an employee, the labor organization shall:

(a) Affirmatively inform the employee, orally or in writing, of the fund's political purpose; and

(b) Affirmatively inform the employee, orally or in writing, of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

(3) The labor organization has the burden of proof to establish that the requirements of subsections (1)(b) and (2) of this section are met.

(4) Notwithstanding the requirements of subsection (1)(b)(ii) of this section, a labor organization may use union dues to lobby or communicate directly with its own members about political candidates, ballot measures, and other political issues. [I.C., § 44-2603, as added by 2003, ch. 97, § 1, p. 311; am. 2003, ch. 340, § 2, p. 916.]

**Compiler's notes.** Section 5 of S.L. 2003, ch. 97 read: "SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the applica-

tion of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

**44-2604. Criminal acts — Penalties.** — (1)(a) It is unlawful for a labor organization to make expenditures for political activities by using contributions:

(i) Secured by physical force or threat of force, job discrimination or threat of job discrimination, membership discrimination or threat of membership discrimination, or economic reprisals or threat of economic reprisals; or

(ii) From union dues except as provided in section 44-2603(4), Idaho Code.

(b) When a labor organization is soliciting contributions for a fund from an employee, it is unlawful for a labor organization to fail to:

(i) Affirmatively inform the employee orally or in writing of the fund's political purpose; and

(ii) Affirmatively inform the employee orally or in writing of the employee's right to refuse to contribute without fear of reprisal or loss of membership in the labor organization.

(c) It is unlawful for a labor organization to pay a member for contributing to the fund by providing a bonus, expense account, rebate of union dues, or by any other form of direct or indirect compensation.

(2) Any person or entity violating this section is guilty of a misdemeanor. [I.C., § 44-2604, as added by 2003, ch. 97, § 1, p. 311.]

**Compiler's notes.** Section 5 of S.L. 2003, ch. 97 read: "SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the applica-

tion of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

**44-2605. Registration — Disclosure.** — Each fund established by a labor organization under this chapter shall:

(1) Register as a political committee as required by chapter 66, title 67, Idaho Code; and

(2) File the financial reports for political committees required by chapter 66, title 67, Idaho Code. [I.C., § 44-2605, as added by 2003, ch. 97, § 1, p. 311.]

**Compiler's notes.** Section 5 of S.L. 2003, ch. 97 read: "SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the applica-

tion of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."



## TITLE 45

### LIENS, MORTGAGES AND PLEDGES

#### CHAPTER.

1. LIENS IN GENERAL, §§ 45-101 — 45-116.
2. UNIFORM FEDERAL LIEN REGISTRATIONS, §§ 45-201 — 45-208.
3. LIENS IN CROPS, §§ 45-301 — 45-318.
4. LOGGERS' LIENS, §§ 45-401 — 45-417.
5. LIENS OF MECHANICS AND MATERIALMEN, §§ 45-501 — 45-525.
6. CLAIMS FOR WAGES, §§ 45-601 — 45-621.
7. HOSPITAL AND NURSING CARE LIENS, §§ 45-701 — 45-705.
8. MISCELLANEOUS LIENS, §§ 45-801 — 45-810.
9. MORTGAGES IN GENERAL, §§ 45-901 — 45-916.
10. MORTGAGE OF REAL PROPERTY, §§ 45-1001 — 45-1004.

#### CHAPTER.

11. AIRCRAFT IMPROVEMENT LIENS, §§ 45-1101 — 45-1107.
12. RECONVEYANCE, §§ 45-1201 — 45-1206.
13. GENERAL PROVISIONS RELATING TO ENFORCEMENT OF LIENS AND MORTGAGES, §§ 45-1301 — 45-1303.
14. [REPEALED.]
15. TRUST DEEDS, §§ 45-1501 — 45-1515.
16. [REPEALED.]
17. NONCONSENSUAL COMMON LAW LIENS, §§ 45-1701 — 45-1705.
18. AGRICULTURAL COMMODITY DEALER LIENS, §§ 45-1801 — 45-1810.
19. STATE LIENS, §§ 45-1901 — 45-1910.

### CHAPTER 1

#### LIENS IN GENERAL

#### SECTION.

- 45-101. Liens defined.
- 45-102. General and special liens.
- 45-103. General lien defined.
- 45-104. Special lien defined.
- 45-105. Satisfaction of prior lien.
- 45-106. Contracts subject to this chapter.
- 45-107. Lien on future interest.
- 45-108. Lien for performance of future obligations — Validity — Priority.
- 45-109. Lien transfers no title.

#### SECTION.

- 45-110. Contracts for forfeiture void.
- 45-111. Personal obligation not implied.
- 45-112. Priority of purchase money mortgage.
- 45-113. Right to redeem from lien.
- 45-114. Rights of junior lienor.
- 45-115. Restoration extinguishes lien.
- 45-116. Effect of modification on priority of lien.

**45-101. Liens defined.** — A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act. [R.S., § 3325; reen. R.C. & C.L., § 3373; C.S., § 6340; I.C.A., § 44-101.]

**Cross ref.** Animals, lien for care of neglected animals, § 25-3511; of tortured animals, § 25-3505; special lien on trespassing animals, § 25-2201; fur-bearing animals, 25-3007; Ratites, [25-3607] 25-3507; Cervidae, [25-3707] 25-3507.

Attorney's lien, § 3-205.

Bankers' liens, § 45-808.

Carey Act liens, § 42-2026 et seq.

Drainage district assessment liens, §§ 42-2935, 42-2936.

Estrays, liens on, § 25-2301 et seq.

Factors' liens, § 45-807.

Forest fire protection, lien on property, § 38-112.

Judgment liens, §§ 5-513, 10-1110.

Livestock, liens for feeding and pasturing, § 45-805.

Mining claims, lien for assessments, §§ 47-1101, 47-1102.

Mining partnership property, liens on, § 53-404.

Purchaser of real property, lien of, § 45-804.

Repair of personal property, lien for, § 45-806.

Secured transaction under Uniform Commercial Code, § 28-9-101 et seq.

Seed liens, §§ 45-304 — 45-314.

Service on personal property, lien for, § 45-805.

Sheep disease control, cost of dipping sheep a lien, § 25-146.

Taxes as lien, tit. 63.

Transfer and inheritance tax a lien on property, § 14-405.

Unclaimed property held for charges, §§ 55-1401 — 55-1404.

Vendors' liens, §§ 45-801 — 45-803.

Cited in: *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

#### ANALYSIS

Encumbrance.

Transfer in trust.

#### Encumbrance.

An encumbrance may be defined as any right or interest in land to the diminution of its value, but consistent with the free transfer of the fee. *Hunt v. Bremer*, 47 Idaho 490, 276 P. 964 (1929).

**45-102. General and special liens.** — Liens are either general or special. [R.S., § 3326; reen. R.C. & C.L., § 3374; C.S., § 6341; I.C.A., § 44-102.]

**Collateral References.** Special or local assessment, superiority of lien over earlier private lien or mortgage where statute creat-

#### Transfer in Trust.

Transfer in trust mentioned by this section is one which creates a trust and absolutely conveys title from grantor, and not a deed of trust which hypothecates the property for payment of the debt. *Brown v. Bryan*, 6 Idaho 1, 51 P. 995 (1896).

**Collateral References.** 53 C.J.S., Liens, § 1.

Definition of liens. 2 A.L.R. 449; 19 A.L.R. 399; 55 A.L.R. 662.

Equitable lien. 32 A.L.R. 932.

State's prerogative right of preference at the common law as against prior liens. 51 A.L.R. 1355; 65 A.L.R. 1331; 90 A.L.R. 184; 167 A.L.R. 640.

ing such special lien is silent as to superiority. 75 A.L.R.2d 1121.

**45-103. General lien defined.** — A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property. [R.S., § 3327; reen. R.C. & C.L., § 3375; C.S., § 6342; I.C.A., § 44-103.]

**Cross ref.** Aircraft, damage from, lien to extent of injury, § 21-205.

Cited in: *Brown v. Bryan*, 6 Idaho 1, 51 P. 995 (1896).

**Collateral References.** Landlord's lien on a chose in action for rent due. 9 A.L.R. 300; 96 A.L.R. 249.

Promise to pay lien as embracing promise to pay debt. 10 A.L.R. 891.

Right of conditional seller of chattels attached to realty to claim lien on the realty. 58 A.L.R. 1121.

Exemption of proceeds of insurance on exempt property as against lien creditors. 63 A.L.R. 1286.

Construction and application of a provision of a lien statute as to quantity or area of land around an improvement which may be subjected to lien. 84 A.L.R. 123.

Effect of a statute relating to an attorney's lien on a common-law or equitable lien. 120 A.L.R. 1243.

**45-104. Special lien defined.** — A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto. [R.S., § 3328; reen. R.C. & C.L., § 3376; C.S., § 6343; I.C.A., § 44-104.]

**Cross ref.** Animals running at large in herd districts, lien for damages, § 25-2408.

Bridges and culverts across highways, costs a lien against premises of ditch owners, § 40-2322.

Federal court judgments, lien of, § 10-1110.

Insect pests and plant diseases, cost of abatement a lien, § 22-2010.

Livestock breaking into inclosure, § 25-2201.

Livestock breaking into inclosures, lien of judgment for damages, § 25-2206.



Partition fences, lien when erected by one owner, §§ 35-103 — 35-112.

**Cited in:** *Brown v. Bryan*, 6 Idaho 1, 51 P. 995 (1896).

**Collateral References.** Constitutionality of statutes providing for lien on motor vehicle inflicting damage to person or property. 61 A.L.R. 655.

**45-105. Satisfaction of prior lien.** — Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists. [R.S., § 3329; reen. R.C. & C.L., § 3377; C.S., § 6344; I.C.A., § 44-105.]

**Cited in:** *Law v. Spence*, 5 Idaho 244, 48 P. 282 (1897); *Nohrnberg v. Boley*, 42 Idaho 48, 246 P. 12 (1925).

#### ANALYSIS

Second deed of trust.

Usury.

#### Second Deed of Trust.

Since the second deed of trust held by the seller of house was functionally equivalent to a mortgage, the holders' lien was special; accordingly, this section entitled them to include payments they made to prevent foreclo-

sure of the first deed of trust as part of the mortgage indebtedness created by their junior encumbrance. *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

Notice of claim to an attorney's lien on property recovered for client. 93 A.L.R. 667.

Right of real estate broker to equitable lien as security for payment of his compensation. 125 A.L.R. 921.

#### Usury.

Junior mortgagee has right to raise question of usury in respect to the first mortgage contract in the same manner as owner of the property. *United States Bldg. & Loan Ass'n v. Lanzarotti*, 47 Idaho 287, 274 P. 630 (1929).

**Collateral References.** 47 Am. Jur. 2d, Judgments, §§ 282-304.

**45-106. Contracts subject to this chapter.** — Contracts of mortgage of real property are subject to all the provisions of this chapter. [R.S., § 3330; reen. R.C. & C.L., § 3378; C.S., § 6345; I.C.A., § 44-106; am. 1967, ch. 272, § 9, p. 745.]

**Compiler's notes.** Section 8 of S.L. 1967, ch. 272 amended § 38-911, which was repealed by S.L. 1967, ch. 328, § 8.

Section 32 of S.L. 1967, ch. 272 read: "This act shall become effective at midnight December 31, 1967, simultaneously with the Uniform Commercial Code. It applies to transactions entered into and events occurring after that date."

Section 33 of S.L. 1967, ch. 272 read:

"Transactions validly entered into before the effective date specified in section 32 and the rights, duties and interest flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute amended by this act as though such amendment had not occurred."

**Cited in:** *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

**45-107. Lien on future interest.** — An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of said interest. [R.S., § 3331; reen. R.C. & C.L., § 3379; C.S., § 6346; I.C.A., § 44-107.]

#### Chattel Mortgage Clause.

After-acquired property clauses in chattel mortgages are invalid insofar as applied to a shifting stock of merchandise, unless the

mortgage contains a proper accounting provision. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

Failure to comply with the terms and con-

ditions of the accounting provision of after-acquired property, as regards shifting stock, will invalidate a chattel mortgage. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

For protection of creditors, Idaho law requires a provision with reference to sales and accounting be incorporated on a shifting stock of goods; where such provision is ignored and a substituted provision never incorporated into a chattel mortgage on the shifting stock of merchandise, the mortgage is void. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

Where mortgagee failed to require that mortgagor comply with provision with respect

to sales and accounting the mortgage did not constitute a valid lien on the shifting stock of logs and lumber, as against the trustee in bankruptcy, and this applies to the rights under a valid field warehouse arrangement. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

Where the evidence is not in conflict that the chattel mortgagee failed to require compliance by the bankrupt with accounting provisions of the mortgage, the court is not bound by the referee's conclusion that the mortgage was valid as to the shifting stock of merchandise. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

**45-108. Lien for performance of future obligations — Validity — Priority.** — A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence, which lien, if not invalid on other grounds, shall be valid as against all persons.

The validity of such contracts and liens as security for any obligation is not affected as against any person by the fact that the contract does not specify, describe or limit the obligations to be secured as to purpose, nature, time, or amount of the obligations to be secured.

All such liens, if otherwise valid, are valid against and prior and superior to all rights, liens and claims acquired by other persons in the property subject thereto after the contract creating such liens was made, except in cases where the person in whose favor the obligation secured by such lien was created, had actual notice of the existence of such subsequent right, lien or claim at the time such obligation was created, and are prior and superior to such subsequent rights, liens or claims irrespective of such or any notice in the following cases:

1. Where the person, in whose favor the obligation secured thereby was created, was legally bound to make the advance or give the consideration resulting in such obligation.

2. Where the consideration for such obligation was necessarily and actually applied to the maintenance and/or preservation of the property subject to the lien.

Making the advance or giving the consideration to result in an obligation not in existence at the time such a contract creating a lien to secure the same is made, is optional with the person making the advance or giving the consideration unless he is bound by an express contract to the contrary which shall not be implied from the fact that the contract to secure such obligation was made.

Obligations otherwise within the limits and description of those specified in any contract creating a lien to secure the performance of obligations not then in existence, but created in favor of any person to whom the original party to be secured by the lien created by such contract has transferred such contract, shall also be secured thereby in like manner as similar obligations between the original parties thereto.

Contracts of mortgage of real property are subject to all the provisions of this section as amended. [R.S., § 3332; reen. R.C. & C.L., § 3380; C. S.,



§ 6347; am. 1929, ch. 255, § 1, p. 520; I.C.A., § 44-108; am. 1955, ch. 145, § 1, p. 286; am. 1967, ch. 272, § 10, p. 745.]

**Compiler's notes.** Section 11 of S.L. 1967, ch. 272 is compiled as § 45-301.

Section 2 of S.L. 1955, ch. 145 declared an emergency. Approved March 12, 1955. For Sections 32 and 33 of S.L. 1967 ch. 272 see compiler's notes, § 45-106.

**Cited in:** State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975).

#### ANALYSIS

**Evidence.**

**Priority.**

**Evidence.**

By reason of this section, parol evidence was admissible to prove that purported deeds were intended to be mortgages. Gem-Valley Ranches, Inc. v. Small, 90 Idaho 354, 411 P.2d

943 (1966), aff'd, 92 Idaho 232, 440 P.2d 352 (1968).

**Priority.**

The general rule in the United States is that if a future advance is obligatory, it takes its priority from the original date of the mortgage, and the subsequent creditor is junior to it; however, if the advance is optional, and if the mortgagee has notice when the advance is made that a subsequent creditor has acquired an interest in the land, then the advance loses its priority to that creditor. Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979).

**Collateral References.** 81 C.J.S., Specific Performance, § 83.

**45-109. Lien transfers no title.** — Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien. [R.S., § 3333; reen. R.C. & C.L., § 3381; C.S., § 6348; I.C.A., § 44-109.]

**Cross ref.** Partition, lienholders may be brought into actions for, §§ 6-509—6-515.

**Cited in:** Brown v. Bryan, 6 Idaho 1, 51 P. 995 (1896).

#### ANALYSIS

**Lien on increase.**

**Lien on joint property.**

**Possession of mortgaged property.**

**Lien on Increase.**

Provision in a contract for the lease of sheep whereby a lien is given on all increase to secure payment of rental therefor conveys no title to such increase. Solomon v. Franklin, 7 Idaho 316, 62 P. 1030 (1900).

**Lien on Joint Property.**

Where no severance of jointly owned stock

certificates occurred before pledgor's death, pledgee bank took as security the interest of but one of two joint tenants, and this interest extinguished when the pledgor failed to survive the other joint owner. Ogilvie v. Idaho Bank & Trust Co., 99 Idaho 361, 582 P.2d 215 (1978).

**Possession of Mortgaged Property.**

Mortgage may provide that mortgagee may take possession of mortgaged property. Larsen v. Roberts, 32 Idaho 587, 187 P. 941 (1919).

**Collateral References.** Transfer or assignment of municipality's right to enforce assessment or lien for local improvements. 55 A.L.R. 667.

**45-110. Contracts for forfeiture void.** — All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void. [R.S., § 3334; reen. R.C. & C.L., § 3382; C.S., § 6349; I.C.A., § 44-110.]

**Cited in:** Brown v. Bryan, 6 Idaho 1, 51 P. 995 (1896).

## ANALYSIS

Lease of sheep.

Quieting of title by vendor of realty.

Quieting title in mortgagee.

### Lease of Sheep.

Provision in contract for lease of sheep declaring forfeiture of all interests of lessee in the sheep, wool, product, and increase thereof, in case of default in payment of rental thereof, is void. *Solomon v. Franklin*, 7 Idaho 316, 62 P. 1030 (1900).

### Quieting of Title by Vendor of Realty.

Provisions for forfeiture in contract for failure to make payments in time and manner specified may be enforced by action to quiet

title after due declaration of forfeiture. *Clinton v. Meyer*, 43 Idaho 796, 255 P. 316 (1927).

### Quieting Title in Mortgagee.

It was error for the trial court, upon finding that purported deeds were in fact mortgages, to decree that, upon failure of the grantor to pay the sum adjudged to be owing within a specified time, title to the land should be quieted in the grantee. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966), *aff'd*, 92 Idaho 232, 440 P.2d 352 (1968).

**Collateral References.** Validity and effect of contract against mechanics' liens. 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

**45-111. Personal obligation not implied.** — The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security. [R.S., § 3335; *reen. R.C. & C.L.*, § 3383; C.S., § 6350; I.C.A., § 44-111.]

**Collateral References.** Right of grantee or transferee to be reimbursed for expenditures in payment of liens of property where conveyance or transfer is in fraud of creditors. 8 A.L.R. 527.

Liability of reorganized corporations, or corporations acquiring title through judicial sale, to lien creditors of the predecessor. 15 A.L.R. 1142.

**45-112. Priority of purchase money mortgage.** — A mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws. [R.S., § 3336; *reen. R.C. & C.L.*, § 3384; C.S., § 6351; I.C.A., § 44-112.]

## ANALYSIS

Assumption of mortgage indebtedness.

Mortgage priority agreements.

Mortgage to procure money for purchase price.

### Assumption of Mortgage Indebtedness.

Where purchasers bought the subject property and assumed and agreed to pay as a part of the purchase price the indebtedness payable to the original mortgagors, the mortgage given to secure such indebtedness as to such purchasers became a purchase money mortgage. *Hagen v. Butler*, 83 Idaho 427, 363 P.2d 712 (1961).

### Mortgage Priority Agreements.

Irrespective of what may have been the status of the mortgages had the parties not agreed regarding the order of priorities, it is clear that by such agreement any rights the appellants might otherwise have had were waived. Parties affected thereby may agree to the order of priority between two or more mortgages. *Hagen v. Butler*, 83 Idaho 427, 363 P.2d 712 (1961).

### Mortgage to Procure Money for Purchase Price.

Mortgage on preempted public land made to procure money to make final payment for the land is a purchase money mortgage within the meaning of this section, and has priority over subsequently accruing marital rights of mortgagor's wife in the land, although she did not join in the mortgage. *Kneen v. Halin*, 6 Idaho 621, 59 P. 14 (1899).

**Collateral References.** 51 Am. Jur. 2d, Liens, §§ 68-75.

Estoppel of one claiming equitable lien in real property, by his failure to disclose his interest. 50 A.L.R. 668.

Priority between purchase money mortgage and mechanics' liens. 58 A.L.R. 911; 102 A.L.R. 233.

Lien of attachment on vendee's or optionee's interest in respect to real property as attaching to title acquired by completion of the contract or exercise of the option. 85 A.L.R. 927.



**45-113. Right to redeem from lien.** — Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed. [R.S., § 3337; reen. R.C. & C.L., § 3385; C.S., § 6352; I.C.A., § 44-113.]

**Construction.**

This statute makes the right of redemption absolute, provided the redemption is sought after debt becomes due and before period of redemption on foreclosure expires. *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115 (1911).

It was error for the trial court, upon finding that purported deeds were in fact mortgages, to foreclose the debtor's right of redemption by decreeing that, upon failure of the grantee to pay the sum adjudged to be owing within a

specified time, title to the land should be quieted in the grantee. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966), *aff'd*, 92 Idaho 232, 440 P.2d 352 (1968).

**Collateral References.** 50A C.J.S., Judicial Sales, §§ 55-57.

Redemption from mortgage or judicial sale as affecting lien intervening between that under which property was sold and that under which it was redeemed. 26 A.L.R. 435.

**45-114. Rights of junior lienor.** — One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,
2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests upon satisfying the claim secured thereby. [R.S., § 3338; reen. R.C. & C.L., § 3386; C.S., § 6353; I.C.A., § 44-114.]

**ANALYSIS**

"Creditors" construed.  
Usury.

**"Creditors" Construed.**

"Creditors" is not limited to attaching creditors but includes any creditor who in some way connects himself with the property, as trustee in bankruptcy in possession of property and creditors whose claims he has al-

lowed. *In re Hickerson*, 162 F. 345 (D. Idaho 1908).

**Usury.**

Junior mortgagee has right to raise question of usury in respect to first mortgage contract in same manner as owner of property. *United States Bldg. & Loan Ass'n v. Lanzarotti*, 47 Idaho 287, 274 P. 630 (1929).

**Collateral References.** 53 C.J.S., Liens, § 22.

**45-115. Restoration extinguishes lien.** — The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith and for a good consideration. [R.S., § 3339; reen. R.C. & C.L., § 3387; C.S., § 6354; I.C.A., § 44-115.]

**Collateral References.** Effect of release of part of the property covered by lien on the

doctrine of inverse order of alienation. 110 A.L.R. 65; 131 A.L.R. 4.

**45-116. Effect of modification on priority of lien.** — (1) The lien of a mortgage and its priority shall not be affected by provisions in the mortgage instrument or in the note or other agreement evidencing the obligation that the mortgage secures, or by the exercise of such provisions by the mortgagee:

(a) which provide for the renegotiation or adjustment of the interest rate at designated intervals, the effect of which may be to increase or decrease the number of periodic payments to be made, or extend or shorten the terms of payment, or both; or

(b) which results in an increase in the underlying mortgage obligation during a portion of the designated term of the mortgage because of deferment of all or a portion of interest payments and the addition of such payments to the outstanding principal balance of the mortgage.

The mortgagee may issue new notes at designated intervals during the term of the mortgage to reflect the modifications described herein.

(2) The provisions of subsection (1) of this section shall apply where the terms of the obligation provide that the interest rate, payment terms, or balance due on the loan may be indexed, adjusted, renewed or renegotiated and the mortgage instrument received for recordation discloses that fact.

(3) As used in this section, the term "mortgage" includes deed of trust. [I.C., § 45-116, as added by 1982, ch. 245, § 1, p. 632.]

## CHAPTER 2

### UNIFORM FEDERAL LIEN REGISTRATIONS

#### SECTION.

45-201. Scope.

45-202. Place of filing.

45-203. Execution of notices and certificates.

45-204. Duties of filing officer.

45-205. Fees.

#### SECTION.

45-206. Uniformity of application and construction.

45-207. Short title.

45-208 — 45-210. [Repealed.]

**45-201. Scope.** — This chapter applies only to federal tax liens and to other federal liens notices of which under any act of congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens. [I.C., § 45-201, as added by 1979, ch. 226, § 2, p. 621.]

**Compiler's notes.** Former chapter 45, which comprised S.L. 1925, ch. 25, §§ 1-5, p. 37; S.L. 1929, ch. 39, §§ 1-5, p. 49; I.C.A. §§ 44-201 — 44-210 was repealed by S.L. 1967, ch. 262, § 8 and the present chapter substituted therefor.

Former sections 45-201 — 45-207 which comprised S.L. 1967, ch. 262, §§ 1-7, p. 733 were repealed by S.L. 1979, ch. 226, § 1 and the present sections substituted therefor.

**Comp. leg.** Cal. Govt. Code §§ 7200 — 7207 (Deering).

**Mont. Rev. Codes Ann.** §§ 84-3901 — 84-3907.

**Nev. Rev. Stat.** §§ 108.825 — 108.837.

**Wyo. Stat.** §§ 29-108 — 29-114.

**Collateral References.** 35 Am. Jur. 2d, Federal Tax Enforcement, §§ 6-24.

Release or discharge of federal tax lien. 105 A.L.R. 1259; 174 A.L.R. 1373.

Sufficiency of designation of taxpayer in recorded notice of federal tax lien. 3 A.L.R.3d 633.

### Commissioner's Comment

This Act is a successor to the Revised Federal Tax Lien Registration Act as revised by the Conference in 1966. The changes made in the previous Act are brought about by the provisions of the Pension Reform Act which prescribes the method of perfecting the em-

ployer liability lien to the same as for federal tax liens.

Therefore, the Act has been changed and now applies to the employer liability lien established by Section 4068(a) of the Pension Reform Act as well as a federal tax lien. Other



similar liens that may be perfected like a federal tax lien, such as the provisions for collection of federal fines contained in pro-

posed revisions to the federal criminal laws, are within the scope of this Act.

**45-202. Place of filing.** — (a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this chapter.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be recorded in the office of the county recorder of the county in which the real property subject to the liens is situated.

(c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed or recorded as follows:

(1) If the person against whose interest the lien applies is a corporation or a partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the secretary of state;

(2) If the person against whose interest the lien applies is a trust that is not covered by paragraph (1) of this subsection, in the office of the secretary of state;

(3) If the person against whose interest the lien applies is the estate of a decedent, in the office of the secretary of state;

(4) In all other cases, in the office of the county recorder of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien. [I.C., § 45-202, as added by 1979, ch. 226, § 2, p. 621; am. 1992, ch. 156, § 1, p. 509.]

**Compiler's notes.** Former § 45-202 was repealed. See Compiler's notes, § 45-201.

Section 2 of S.L. 1992, ch. 156 contained repeals and § 3 is compiled as § 45-204.

### Commissioner's Comment

1. In order to accommodate to commercial convenience so far as possible within the limitations of Section 6323 of the Internal Revenue Code, filing with the secretary of state is provided for the lien on tangible and intangible personal property of partnerships and corporations (as those terms are defined in Section 7701 of the Internal Revenue Code of 1954 and the implementing regulations) thus including within "partnerships" such entities as joint ventures and within "corporations" such entities as joint stock corporations and business trusts.

Because most purchases and secured transactions involving personal property of natural persons relate to consumer goods or farm personal property, searches for liens against those persons are more likely to be made at the local level. Thus, with few exceptions a search for corporation federal tax liens with the secretary of state and for natural persons with an officer in the county of residence will

normally be in the same office as searches for security interests under the Uniform Commercial Code.

Section 6323 of the Internal Revenue Code "locates" all tangible and intangible personal property at the residence of the taxpayer even though it is physically located elsewhere in the same or in another state. State law cannot vary this requirement. State law does affect the result, however, in that state law determines the "residence" of a taxpayer. See IRC § 6323(f)(2). Filing at the physical location of personal property of a taxpayer who is not a resident of the state of location of the property cannot be required.

2. The coverage of this Act now extends beyond federal tax liens as described in the Comment to Section 1.

3. In some jurisdictions, a question may be raised concerning the propriety of incorporating federal law by reference. In others, the place of filing described in this Act may not

correspond to the place of filing under the Uniform Commercial Code. Alteration of this Act in these respects may create the peril that

the notices will be filed in the federal district court, thus eliminating the benefits of this Act.

**45-203. Execution of notices and certificates.** — Certification of notices of liens, certificates, or other notices affecting federal liens by the secretary of the treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying of notice of any other lien, entitles them to be filed and no other attestation, certification, or acknowledgement is necessary. [I.C., § 45-203, as added by 1979, ch. 226, § 2, p. 621.]

**Compiler's notes.** Former § 45-203 was repealed. See Compiler's notes, § 45-201.

#### Commissioner's Comment

This section addresses only the validity of the filing and not the validity of the lien.

**45-204. Duties of filing officer.** — (a) If a notice of federal lien, certificate or other notice affecting a federal lien is presented to the secretary of state, he shall file it in the same manner as if it were an equivalent document filed under part 4, chapter 9, title 28, Idaho Code.

(b) For purposes of the foregoing subsection (a), the following equivalencies between notices filed under this chapter and documents filed under part 4, chapter 9, title 28, Idaho Code, shall apply:

- (1) Notice of federal lien: financing statement;
- (2) Refiling of notice of federal lien: continuation statement;
- (3) Certificate of discharge or subordination: release; and
- (4) Certificate of release or nonattachment: termination statement.

(c) If a notice of federal lien, certificate or other notice affecting a federal lien is presented to the county recorder, he shall record it in the general lien records.

(d) Upon the request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien filed under this chapter for which the refiling period established by federal law has not passed without a refiling of notice, naming a particular person, and if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate. Upon request, the filing officer shall furnish a copy of any notice of federal lien, or notice or certificate affecting a federal lien. If the filing officer is the secretary of state, the fees for such certificate and copies shall be fixed by administrative rule. If the filing officer is the county recorder, the fees shall be as set forth in section 31-3205, Idaho Code.

(e) The secretary of state may by administrative rule provide for publication of a list of those notices of federal lien filed in his office which the filing federal agency has identified as relating to agricultural crops. [I.C., § 45-204, as added by 1992, ch. 156, § 3, p. 509.]



**Compiler's notes.** Former § 45-204 which comprised 1967, ch. 262, § 4, p. 733 was repealed by S.L. 1979, ch. 226, § 2, p. 733 and replaced by I.C., § 45-204, as added by 1979, ch. 226, § 2, p. 621 which was in turn repealed by S.L. 1983, ch. 40, § 1.

Another former § 45-204, which comprised I.C., § 45-204, as added by 1983, ch. 40, § 2, p. 98, was repealed by S.L. 1992, ch. 156, § 2.

Section 2 of S.L. 1992, ch. 156 contained repeals, and § 1 is compiled as § 45-202.

**45-205. Fees.** — (a) If the filing officer is the secretary of state, the fee for filing each notice of lien or certificate or notice affecting the lien is six dollars (\$6.00), except that there shall be no fee for a certificate of release or nonattachment.

(b) If the filing officer is the county recorder, the fee for recording each notice of lien or certificate or notice affecting the lien is the standard recording fee in section 31-3205, Idaho Code.

(c) The filing officer may bill the district directors of internal revenue or other appropriate federal officials on a monthly basis for fees for documents filed by them. [I.C., § 45-205, as added by 1992, ch. 156, § 4, p. 509.]

**Compiler's notes.** Former § 45-205 was repealed. See Compiler's notes, § 45-201.

Another former § 45-205, which comprised

I.C., § 45-205, as added by 1979, ch. 226, § 2, p. 621, was repealed by S.L. 1992, ch. 156, § 2.

#### Commissioner's Comment

1. It is understood that the Treasury accepts the obligation to pay nondiscriminatory filing fees for filing notice of tax liens but desires those payments to be on a monthly billing basis. For notice of tax lien on real property, the filing fee for a real estate mortgage may serve as a standard; for a filing fee on notice of tax lien on personal property the filing fee for filing a financing statement may serve as a standard. There is now no established practice concerning fees for other notices. The certificate of discharge is comparable to a satisfaction of a real estate mortgage and to release of collateral under Section 9-406 of the Uniform Commercial Code. Those instruments are usually filed by persons other than the Treasury, and a filing fee for filing them should be prescribed.

A different problem is presented by certificates of release or non-attachment. Sometimes those certificates serve the purpose of permitting the public filing official to clear his

records, and for that purpose the filing fee perhaps should be low in order to induce filing. Sometimes those notices are filed for purposes of the taxpayer. Given the volume of notices of tax liens which are filed daily in large filing offices, it may serve the public interest to have filed certificates of release. From the standpoint of the Treasury, those certificates serve no important purpose, and the Treasury may not file them if the fee is large. In adoption of this Act, consideration should be given by the states to providing a substantially smaller fee for filing a certificate of release, so that when a tax case is closed the Treasury will file those releases in a routine manner in order to reduce the storage and administrative problem of the local and state filing officers.

2. It is understood that the Pension Benefit Guaranty Corporation will accept the same obligations as those imposed on the Treasury for federal tax liens.

**45-206. Uniformity of application and construction.** — This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. [I.C., § 45-206, as added by 1979, ch. 226, § 2, p. 621.]

**Compiler's notes.** Former § 45-206 was repealed. See Compiler's notes, § 45-201.

**45-207. Short title.** — This chapter may be cited as the "Uniform Federal Lien Registration Law." [I.C., § 45-207, as added by 1979, ch. 226, § 2, p. 621.]

**Compiler's notes.** Former § 45-207 was repealed. See Compiler's notes, § 45-201.

**45-208 — 45-210. Entry of certificate of discharge — Fees of county recorder — Purpose of act. [Repealed.]**

**Compiler's notes.** These sections, which comprised S.L. 1925, ch. 25, §§ 3-5, p. 37; I.C.A., §§ 44-208 — 44-210; am. 1951, ch.

251, § 9, p. 540; am. 1959, ch. 72, § 9, p. 157, were repealed by S.L. 1967, ch. 262, § 8.

## CHAPTER 3

### LIENS IN CROPS

#### SECTION.

- 45-301. Purpose and scope.
- 45-302. Definitions.
- 45-303. Farm laborer's lien.
- 45-304. Seed lien.
- 45-305, 45-306. [Repealed.]
- 45-307. Attachment of lien.
- 45-308. Notice of claim of lien.
- 45-308A. Amendment or assignment of notice.
- 45-309. Civil penalty for false claim.

#### SECTION.

- 45-310. Duration of lien.
- 45-311. Duty to release upon satisfaction.
- 45-312. List of liens in farm crops.
- 45-313. Lien search.
- 45-314. When buyer takes free of lien.
- 45-315. Duty of buyer.
- 45-316. Administrative rulemaking.
- 45-317. Effective date and transition.
- 45-318. Applicability of uniform commercial code.

**45-301. Purpose and scope.** — (1) The purpose of this chapter is to provide a unified system for creation of liens and to provide notice of claims of liens in farm crops.

(2) The scope of this chapter is limited to liens in the crops of producers, and such liens are limited in amount to the value of the seeds or labor used in the production of the crops, plus expenses incurred in obtaining recovery pursuant to this chapter. [I.C., § 45-301, as added by 1989, ch. 359, § 2, p. 900.]

**Compiler's notes.** The following former sections were repealed by S.L. 1989, ch. 359, § 1:

45-301. (1893, p. 49, ch. 3, § 1; am. 1895, p. 137, § 1; reen. 1899, p. 147, ch. 3, § 1; am. 1903, p. 93, § 1; reen. R.C. & C.L., § 5141; C.S., § 7372; I.C.A., § 44-301; am. 1967, ch. 272, § 11, p. 745).

45-302. (1893, p. 49, ch. 3, § 3; reen. 1899, p. 147, ch. 3, § 2; reen. R.C., § 5142; am. 1915, ch. 79, p. 192; reen. C.L., § 5142; C.S., § 7373; am. 1923, ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., § 44-302).

45-303. (C.S., § 7373a, as added by 1923,

ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., § 44-303).

45-304. (C.S., § 7373b, as added by 1923, ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., § 44-304).

Section 3 of S.L. 1989, ch. 359 read: "This act shall not take effect unless and until a sufficient appropriation to support its implementation is passed for the fiscal year 1990." An appropriation was made from the general appropriation to the Secretary of State in order to implement this act and therefore it has gone into effect.



## DECISIONS UNDER PRIOR LAW

**Exclusivity of Remedies.**

Former section provided a lien on the crop as security for the payment of any judgment awarded; the wage claim statute, § 45-615, on the other hand, provides for the measure of damages to be awarded. Neither the language

nor the titles of the separate acts suggested that the remedies under the acts were mutually exclusive; the two statutes were intended to fulfill different purposes. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

**45-302. Definitions.** — For the purposes of this chapter:

(1) "Buyer" means a person who purchases, on his own behalf or as an agent for others, a crop from a producer.

(2) "Claimant" means a provider of seed or farm labor who files a notice of claim of lien in a crop.

(3) "Crop year" means the calendar year in which a crop would normally be harvested.

(4) "Crops" means products of the soil. As it relates to liens for seed, the term "crops" shall be limited to annual crops. As it relates to liens for farm labor, it shall include annual crops as well as fruits, berries, grapes and nursery products.

(5) "Person" means an individual, partnership, corporation, or association.

(6) "Producer" means a farm operator to whom a claimant has provided seed or farm labor.

(7) "Written notice" means information communicated to a person in writing by an authorized person or entity and may include electronic, facsimile, computer or equivalent media. [I.C., § 45-302, as added by 1989, ch. 359, § 2, p. 900; am. 1996, ch. 262, § 1, p. 862.]

**Compiler's notes.** Former § 45-302 was repealed. See compiler's note, § 45-301.

Section 2 of S.L. 1996, ch. 262 is compiled as § 45-308.

**45-303. Farm laborer's lien.** — (1) Any person who performs farm labor on a farm in furtherance of production of a crop shall have a lien in the crop for the agreed or reasonable value of the labor.

(2) The farm laborer's lien shall have priority over any security interest in the same crop.

(3) A landlord's interest in a crop produced on premises which are leased in consideration of a share of the crop is not subject to a farm laborer's lien. [I.C., § 45-303, as added by 1989, ch. 359, § 2, p. 900.]

**Compiler's notes.** Former § 45-303 was repealed. See compiler's note, § 45-301.

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

**Construction.**

Enforcement against various crops.

Estoppel of landlord.

Laborers employed by vendees.

Lienable and nonlienable items.

## Nature of work.

**Construction.**

Generally, farm labor liens are purely statutory, and anyone claiming such a lien must substantially comply with the statute. *Nohnberg v. Boley*, 42 Idaho 48, 246 P. 12

(1925); *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

#### **Enforcement Against Various Crops.**

Where right of farm laborer's lien arose by virtue of work on several different crops in season's farm operations, he could have demanded that such lien be enforced against the whole or any part of such crop or crops. *Roberts v. Bean*, 50 Idaho 680, 299 P. 1081 (1931).

#### **Estoppel of Landlord.**

Where landlord agreed to pay lienable labor before labor was performed, he may be estopped to claim his portion of crop to extent of such labor liens. *Farm Credit Corp. v. Rigby Nat'l Bank*, 49 Idaho 444, 290 P. 211 (1930).

#### **Laborers Employed by Vendees.**

Where sales contract stipulated that vendees should cultivate and care for orchard in good and husbandlike manner, and vendors retook possession and retained crops on account of vendees' default in payments, vendors' consent to employment of laborers by vendees was implied. *Burlile v. Leith*, 47 Idaho 537, 277 P. 428 (1929).

Where vendors of orchard regained title by forfeiture of sales contract and did not show any inclination to have laborers employed by vendees cease work or that they would not

accept crops which laborers continued to assist in producing, laborers are entitled to lien. *Burlile v. Leith*, 47 Idaho 537, 277 P. 428 (1929).

#### **Lienable and Nonlienable Items.**

Where farm laborer performed services for which he was to be compensated under an entire contract embracing both lienable and nonlienable items, he was entitled to lien for value of lienable items only when their value could be distinguished from the value of nonlienable items. *Wheatcroft v. Griffith*, 42 Idaho 231, 245 P. 71 (1926).

#### **Nature of Work.**

One who performed labor in producing agricultural crop was entitled to a lien, no matter what the work, labor, or service may have been, so long as it was shown that such work was for a useful purpose, that charges were reasonable and that he had not been paid, and such lien took precedence over all other liens of whatever nature or description. *Chapman v. A.H. Averill Mach. Co.*, 28 Idaho 121, 152 P. 573 (1915).

One who employed his teams and machinery in harvesting and threshing crop was entitled to a lien for the reasonable compensation for their use, as well as for his own labor. *Chapman v. A.H. Averill Mach. Co.*, 28 Idaho 121, 152 P. 573 (1915).

**45-304. Seed lien.** — (1) Any person who furnishes seed to a producer to be sown or planted on lands owned, rented or otherwise lawfully occupied by the producer, shall have a lien in the crop or crops produced from the seed for the purchase price of the seed.

(2) The seed lien shall have priority over any security interest in the same crop, but shall be subordinate to a farm laborer's lien in the same crop.

(3) A landlord's interest in a crop produced on premises which are leased in consideration of a share of the crop is not subject to a seed lien. [I.C., § 45-304, as added by 1989, ch. 359, § 2, p. 900.]

**Compiler's notes.** Former § 45-304 was repealed. See Compiler's note, § 45-301.

#### **Pre- and Post-Petition Liens.**

Where seed potatoes were shipped in separate loads, both before and after a bankruptcy hearing, under state law priority a creditor

could use a dismissed bankruptcy proceeding to jump ahead of another creditor who provided seed potatoes to the debtor and who held liens on both pre- and post-petition shipments. *Tri River Chem. Co. v. TNT Farms*, 226 Bankr. 436 (Bankr. D. Idaho 1998).

### **45-305, 45-306. Enforcement against property — Joinder of actions — Filing fees as costs — Attorney's fees. [Repealed.]**

**Compiler's notes.** These sections, which comprised C.S., §§ 7373c, 7373d as added by 1923, ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., §§ 44-305, 44-306, were repealed by S.L. 1989, ch. 359, § 1.

Section 3 of S.L. 1989, ch. 359 read: "This act shall not take effect until a sufficient

appropriation to support its implementation is passed for the fiscal year 1990." An appropriation was made from the general appropriation to the Secretary of State in order to implement this act and therefore it has gone into effect.



**45-307. Attachment of lien.** — (1) A lien in a crop attaches when a claimant files a notice of claim of lien with the secretary of state.

(2) A lien attaches to the crop subject to the lien, to any right or claim arising from any loss or damage to the crop, and to any payment to the producer for the crop from any purchaser thereof. [I.C., § 45-307, as added by 1989, ch. 359, § 2, p. 900; am. 1991, ch. 217, § 1, p. 521.]

**Compiler's notes.** Former § 45-307, which comprised C.S., § 7373e, as added by 1923, ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., § 44-307), was repealed by S.L. 1989, ch. 359, § 1.

Section 3 of S.L. 1989, ch. 359 read: "This act shall not take effect unless and until a

sufficient appropriation to support its implementation is passed for the fiscal year 1990." An appropriation was made from the general appropriation to the Secretary of State in order to implement this act and therefore it has gone into effect.

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Necessity of filing.  
Scope of lien.

##### Necessity of Filing.

Where no claim of lien was filed, no lien attached and property could not be held against purchaser at execution sale. *Nohrnberg v. Boley*, 42 Idaho 48, 246 P. 12 (1925); *Vollmer Clearwater Co. v. Union*

*Whse. & Supply Co.*, 43 Idaho 37, 248 P. 865 (1926); *Price v. Bray*, 48 Idaho 268, 281 P. 470 (1929).

##### Scope of Lien.

After a crop is sold, the lien attached, if at all, only to the crop in the hands of the vendee and not to the proceeds derived from the sale. *Church v. Roemer*, 94 Idaho 782, 498 P.2d 1255 (1972).

**45-308. Notice of claim of lien.** — (1) A claimant must file with the secretary of state a notice of claim of lien between thirty (30) days before and one hundred twenty (120) days after completion of his labor for or providing seed to the producer. If a notice of claim of lien is filed before completion of the labor or delivery of the seed, there must exist a written or verbal contract for such labor or seed.

(2) The notice of claim of lien must include:

(a) The nature of the lien (farm laborer's or seed);

(b) The name and address of the producer;

(c) The name and address of the claimant;

(d) The county or counties where the crop or crops covered by the lien are grown;

(e) The type(s) of crop (name of commodity) to which the lien applies;

(f) The crop year of the crop(s) to which the lien applies;

(g) Such other information as the secretary of state shall by administrative rule require; and

(h) The amount of claim exclusive of interest.

(3) The notice of claim of lien shall be signed by the claimant, his agent, or his attorney-in-fact, and the signer shall certify to the truth of the claim. Notarization is not required.

(4) The notice of claim of lien shall be filed on a standard form prescribed by the secretary of state.

(5) A claimant shall give written notice of the claim to the producer. [I.C., § 45-308, as added by 1989, ch. 359, § 2, p. 900; am. 1996, ch. 262, § 2, p. 862; am. 2000, ch. 338, § 1, p. 1131.]

**Compiler's notes.** Former § 45-308, which comprised C.S., § 7373f, as added by 1923, ch. 33, § 1, p. 36; am. 1927, ch. 182, § 1, p. 245; I.C.A., § 44-308, was repealed by S.L. 1989, ch. 359, § 1.

Section 1 of S.L. 1996, ch. 262 is compiled as § 45-302.

Section 2 of S.L. 2000, ch. 338, is compiled as § 45-310.

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

##### Amendment of notice.

Liberal construction, sufficiency of notice and lien claim.

Necessity of filing.

Notice of lien.

—Description requirements.

Notice to vendee.

Sufficiency of description.

Sufficiency of notice and claim of lien.

##### Amendment of Notice.

Refusal to allow amendment of notice after time for filing had expired was proper, particularly where proposed amendment would not have cured the defect. *Linch v. Perrine*, 51 Idaho 152, 4 P.2d 353, 81 A.L.R. 355 (1931).

##### Liberal Construction, Sufficiency of Notice and Lien Claim.

Former similar section was to be liberally construed in favor of the claimant, and this included the determination of whether the notice and claim of lien sufficiently described the property upon which the lien was sought and its location. *Kerby v. Robinson*, 58 Idaho 781, 80 P.2d 33, 116 A.L.R. 1004 (1938).

Where contract of employment fixed wages and total hours of work, and a certain number of hours were devoted to nonlienable work, the percentage of wages devoted to lienable labor was a mathematical calculation and should not have been fixed by evidence of the real value of either lienable or nonlienable labor. *Roberts v. Bean*, 50 Idaho 680, 299 P. 1081 (1931).

Former similar section was to be liberally construed in favor of the farm laborer and this liberal construction included the determination of whether the notice and claim of lien sufficiently described the property upon which the lien was sought and its location. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

##### Necessity of Filing.

It is indispensable prerequisite of enforcement of such liens that claim of lien should be filed within time prescribed by statute. *Nohrberg v. Boley*, 42 Idaho 48, 246 P. 12 (1925).

Sums paid laborers for harvesting crops could not be deducted from damages arising from conversion of crop where claims of liens for such services had not been filed, even though period for filing such claims had not

expired. *Vollmer Clearwater Co. v. Union Whse. & Supply Co.*, 43 Idaho 37, 248 P. 865 (1926).

Where claimant alleged that lien was filed on certain date, general denial did not justify judgment on pleadings since it was the notice and not the lien that was to be filed. *Linch v. Perrine*, 51 Idaho 152, 4 P.2d 353, 81 A.L.R. 355 (1931).

##### Notice of Lien.

Where notice of lien described crop only as a crop of apples and there were in fact no apple trees growing on land described, such notice was insufficient to create a lien. *Linch v. Perrine*, 51 Idaho 152, 4 P.2d 353, 81 A.L.R. 355 (1931).

Notice of lien could not be amended after statutory time for filing had elapsed. *Linch v. Perrine*, 51 Idaho 152, 4 P.2d 353, 81 A.L.R. 355 (1931).

##### —Description Requirements.

The lien granted by former similar section was against the crop, not against the land; therefore, it was the crop which should have been described so that it might have located with reasonable certainty. The statute did not require a legal description of the property from which the crop was grown. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

##### Notice to Vendee.

The lien may be enforced against farm products sold to a vendee, even though the vendee did not receive notice of the lien, if he did not demand sworn, written notice required by this section. *Church v. Roemer*, 94 Idaho 782, 498 P.2d 1255 (1972).

##### Sufficiency of Description.

Description in farm laborer's lien notice which stated that it was intended to cover entire crop of hay produced for the year was sufficient and was not void for uncertainty. *Beckstead v. Griffith*, 11 Idaho 738, 83 P. 764 (1906).

Liens are not defective because the notices do not set forth the specific type of farm work performed in harvesting the crops; thus, a claim upon the crops "for labor performed, assistance rendered and expenses incurred" provides language meeting the essential requirements of former similar section and § 45-407. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).



**Sufficiency of Notice and Claim of Lien.**

Where a notice of claim of lien was signed and verified before a notary public, filed in the proper county, and in substance stated the name of the owner, or reputed owner, of the crop for whom the work was done, who was lessee of the owner of the land on which the crops were grown, and the names of the parties who had possession of the crops at the

time the lien was filed, and stated the work consisted of harvesting and hauling said crop to market, and the pay therefor, and giving the total amount claimed, it was sufficiently certain as against a demurrer to the complaint to foreclose the lien. *Kerby v. Robinson*, 58 Idaho 781, 80 P.2d 33, 116 A.L.R. 1004 (1938).

**45-308A. Amendment or assignment of notice.** — (1) A claimant may amend a notice of claim of lien to disclose a change of the name or address of a claimant or producer by filing a notice of amendment with the secretary of state. The notice of amendment shall include:

- (a) The file number assigned by the secretary of state to the notice of claim of lien to be amended by the notice of amendment;
- (b) The date of filing of the notice of claim of lien to be amended;
- (c) The name of the claimant on the notice of claim of lien to be amended; and
- (d) The information to be amended.

(2) A claimant may assign his rights under a lien and may give notice of the assignment by filing a notice of assignment with the secretary of state. The notice of assignment shall include:

- (a) The file number assigned by the secretary of state to the notice of claim of lien to which the assignment pertains;
- (b) The date of filing of the notice of claim of lien to which the assignment pertains;
- (c) The name of the claimant on the notice of claim of lien to which the assignment pertains; and
- (d) The name and address of the assignee.

(3) A notice of amendment or a notice of assignment shall be filed on a standard form prescribed by the secretary of state, and upon the same execution and fee conditions as apply to a notice of claim of lien. [I.C., § 45-308A, as added by 1997, ch. 35, § 1, p. 62.]

**Compiler's notes.** Section 2 of S.L. 1997, ch. 35 declared an emergency. Approved March 12, 1997.

**45-309. Civil penalty for false claim.** — (1) Any person who signs and files a notice of claim of lien which he knows or has reason to believe is false shall be liable to the producer in the amount of the actual damages caused by the false claim or five hundred dollars (\$500), whichever is greater, plus reasonable attorney's fees and costs. If the claimant has failed to give written notice of a claim which is found to be false, to the producer as required by subsection (5) of section 45-308, Idaho Code, the claimant shall be liable for an additional penalty of five hundred dollars (\$500).

(2) If the notice of claim of lien is signed by a person other than the claimant, and the claimant knows or has reason to believe the claim is false, the claimant and the person who signed the claim shall be jointly and severally liable for the amount described in subsection (1) of this section.

[I.C., § 45-309, as added by 1989, ch. 359, § 2, p. 900; am. 1996, ch. 262, § 3, p. 862.]

**Compiler's notes.** Former § 45-309, which comprised 1893, p. 49, ch. 3, § 3; reen. 1899, p. 147, ch. 3, § 3; reen. R.C. & C.L., § 5143; C.S., § 7374; I.C.A., § 44-309, was repealed by S.L. 1989, ch. 359, § 1.

awarded costs and reasonable attorney fees on appeal. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 986 P.2d 1019 (Ct. App. 1999).

#### **Attorney Fees.**

The plaintiff, as the producer who succeeded on a false labor lien claim, was

**45-310. Duration of lien.** — (1) A notice of claim of lien for farm labor remains in effect for twelve (12) months from the date of filing. The notice of claim of lien may be extended for six (6) months by filing a notice of extension of claim of lien. The notice of extension shall contain such information as the form prescribed by the secretary of state shall require, and shall be filed within sixty (60) days prior to the lapse of the original twelve (12) month period.

(2) A notice of claim of lien for seed remains in effect for sixteen (16) months from the date of filing. If a crop subject to a lien for seed is not harvested within ten (10) months after the date of filing, the notice of claim of lien may be extended for six (6) months by filing a notice of extension of claim of lien. The notice of extension shall contain such information as the form prescribed by the secretary of state shall require, and shall be filed within sixty (60) days prior to the lapse of the original sixteen (16) month period.

(3) Civil action to enforce a lien on crops shall be commenced within the periods set forth in subsections (1) and (2) of this section. [I.C., § 45-310, as added by 1989, ch. 359, § 2, p. 900; am. 2000, ch. 338, § 2, p. 1131.]

**Compiler's notes.** Former § 45-310, which comprised, 1895, p. 137, § 2; reen. 1899, p. 147, ch. 3, § 4; am. R.C. & C.L., § 5144; C.S., § 7375; am. 1923, ch. 24, § 1, p.

27; I.C.A., § 44-310, was repealed by S.L. 1989, ch. 359, § 1.

Section 1 of S.L. 2000, ch. 338, is compiled as § 45-308.

#### **DECISIONS UNDER PRIOR LAW**

#### **Change in Parties.**

Where action was commenced against one corporation, plaintiff could not, more than six months after its claim had been filed, bring in

another related corporation as a party defendant. *Church v. Roemer*, 94 Idaho 782, 498 P.2d 1255 (1972).

**45-311. Duty to release upon satisfaction.** — (1) When a claimant's lien has been satisfied, the claimant shall, within thirty (30) days after satisfaction, file with the secretary of state a notice of release of lien.

(2) The notice of release shall be signed by the claimant, his agent, or his attorney-in-fact.

(3) The notice of release shall be filed on a standard form prescribed by the secretary of state. [I.C., § 45-311, as added by 1989, ch. 359, § 2, p. 900.]



**45-312. List of liens in farm crops.** — (1) The secretary of state shall publish a list of all presently effective notices of claim of lien in farm crops. The list shall be distributed to all persons who register therefor, on a schedule to be set by administrative rule of the secretary of state, but not less frequently than semimonthly.

(2) The list shall be published in a format established by administrative rule of the secretary of state, and may be in either complete form or in cumulative supplements to a complete list. [I.C., § 45-312, as added by 1989, ch. 359, § 2, p. 900.]

**Sec. to sec. ref.** This section is referred to in §§ 45-314 and 45-1909.

**45-313. Lien search.** — (1) Upon request the secretary of state shall issue a certificate listing all liens in crops of a particular producer for which notices of claim are on file in his office. The requesting party may additionally request copies of all relevant notices of claim of lien.

(2) Upon the request of any person, the secretary of state shall provide, within twenty-four (24) hours (excluding weekends and holidays), a verbal listing of liens in crops as described in subsection (1) of this section, followed by the certificate.

(3) The secretary of state shall, by administrative rule, prescribe the standards and forms for the lien searches described in this section. [I.C., § 45-313, as added by 1989, ch. 359, § 2, p. 900.]

**Compiler's notes.** The words in parentheses so appeared in the law as enacted.

**45-314. When buyer takes free of lien.** — (1) A buyer takes free of a lien in crops if he purchases and pays for a crop before a notice of claim of lien is filed with the secretary of state.

(2) A buyer who has registered for, and has received, the list of liens described in section 45-312, Idaho Code, takes free of a lien in crops if:

(a) When he purchases and pays for a crop, there is no notice of claim of lien in that crop on the current list of liens published under section 45-312, Idaho Code; and

(b) He has no actual notice of the existence of the lien.

As against buyers, a list is current until the third day after publication of the next list, or if mail is not delivered on that day, on the next day thereafter on which mail is delivered. [I.C., § 45-314, as added by 1989, ch. 359, § 2, p. 900.]

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Scope of lien.  
—Proceeds.

##### Scope of Lien.

—Proceeds.  
Where the crops were delivered to a grain

company before the plaintiffs filed their claims of liens, pursuant to this section, but the grain company still had possession of the crops and had not paid the purchase price when it received notice of the claimed liens, the proceeds from the sale of the crops was subject to the liens; thus, the bond or

undertaking, required under former § 45-310, stood for the payment of any judgment, including costs and attorney's fees, rendered in favor of the lien claimants. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

**45-315. Duty of buyer.** — A buyer who does not take free of a lien under section 45-314, Idaho Code, is obligated to secure permission of the claimant to pay the producer in full or to insure payment of the claimant from the purchase price. [I.C., § 45-315, as added by 1989, ch. 359, § 2, p. 900.]

**45-316. Administrative rulemaking.** — The secretary of state shall promulgate such administrative rules as are necessary to implement the provisions of this chapter and to set fees for all services provided for in this chapter. [I.C., § 45-316, as added by 1989, ch. 359, § 2, p. 900.]

**45-317. Effective date and transition.** — (1) This chapter shall be effective as to all notices of claim of lien in crops filed on or after January 1, 1990.

(2) Notices of claim of farm laborer's lien, and notices of claim of seed lien recorded in the appropriate county recorders' offices under the prior law shall remain effective until the date they would normally expire under the prior law. [I.C., § 45-317, as added by 1989, ch. 359, § 2, p. 900.]

**Compiler's notes.** Section 3 of S.L. 1989, ch. 359 read: "This act shall not take effect unless and until a sufficient appropriation to support its implementation is passed for the

fiscal year 1990." An appropriation was made from the general appropriation to the Secretary of State in order to implement this act and therefore it has gone into effect.

**45-318. Applicability of uniform commercial code.** — The liens provided for by this chapter are "agricultural liens" as defined in section 28-9-102, Idaho Code. The perfection and effect of perfection or nonperfection of the liens provided by this chapter are governed by uniform commercial code article 9, secured transactions (chapter 9, title 28, Idaho Code). In the event of any conflict between the provisions of this chapter relating to perfection and the effect of perfection or nonperfection of any lien provided by this chapter and the provisions of chapter 9, title 28, Idaho Code, relating to those same issues, the provisions of chapter 9, title 28, Idaho Code, shall prevail. [I.C., § 45-318, as added by 2001, ch. 208, § 25, p. 704.]

**Compiler's notes.** Sections 24 and 26 of S.L. 2001, ch. 208, are compiled as §§ 28-50-116 and 8-506A, respectively.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.



## CHAPTER 4

## LOGGERS' LIENS

## SECTION.

- 45-401. Liens upon saw logs.
- 45-402. Lien on lumber made from saw logs.
- 45-403. Lien for purchase price upon logs.
- 45-404. Liens preferred to other liens.
- 45-405. Time for filing lien for work or labor.
- 45-406. Time for filing liens for purchase price.
- 45-407. Claim of lien for work or labor.
- 45-408. Claim of lien for purchase price.
- 45-409. Record of claims.
- 45-410. Duration of lien.
- 45-411. Rules of practice and appeals.

## SECTION.

- 45-412. Enforcement against whole or part of property.
- 45-413. Joinder of actions — Filing fees as costs — Attorney's fees.
- 45-414. Enforcement of judgments — Apportionment of proceeds.
- 45-415. Property may be sold as personalty.
- 45-416. Interference with property subject to lien — Liability to lienholder.
- 45-417. Interference with property subject to lien — Penalty — Bond.

**45-401. Liens upon saw logs.** — Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, cord wood, or other timber, has a lien upon the same for the work or labor done upon, or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook shall be regarded as a person who assists in obtaining or securing the timber herein mentioned. [1893, p. 49, ch. 2, § 1; reen. 1899, p. 147, ch. 2, § 1; reen. R. C. & C.L., § 5125; C.S., § 7356; I.C.A., § 44-401.]

**Sec. to sec. ref.** This section is referred to in §§ 45-405 and 45-407.

**Cited in:** Boone v. P & B Logging Co., 88 Idaho 111, 397 P.2d 31 (1964).

## ANALYSIS

**Constitutionality.****Construction.****Filing with lumber inspector.****Lien on lumber made from logs.****Review of denial of penalty.****Constitutionality.**

This section is not unconstitutional in that it imposes a hardship upon owner of the property. *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914).

**Construction.**

Lien for services rendered in connection with hauling gravel and placing the gravel on mill yard site of the bankrupt, to facilitate stacking of lumber for drying and enable bankrupt to transport the logs to the mill, was not a lien for work, labor and services performed in logging or in manufacturing saw logs into lumber. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

This "loggers' lien" statute is for the benefit of one who performs the labor and is not extended to one who hires the labor performed and pays for it. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

By this provision a person "performing

work upon" any of the property herein enumerated is given the same lien as is given to a person who "assists in obtaining or securing" any such property. *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914).

This section confers lien upon laborers who work in the employ of contractor in moving a large quantity of railroad ties a distance of a couple of hundred feet from place where they were piled upon railroad company's right of way and loading them upon cars for transportation. *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914).

Railroad ties sawed at sawmill in same manner as other lumber are not "other timber." *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

**Filing with Lumber Inspector.**

Claim of lien is not void between parties because not filed with lumber inspector as required by § 38-911 (repealed). *Schultz v. Rose Lake Lumber Co.*, 27 Idaho 528, 149 P. 726 (1915).

**Lien on Lumber Made from Logs.**

Laborer performing work in securing logs to be manufactured is entitled to a lien therefor on lumber manufactured from logs. *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

**Review of Denial of Penalty.**

Where plaintiff brings an action seeking to recover wages and penalty for nonpayment,

and the trial court holds against him with respect to the penalty, and the defendant appeals, the Supreme Court will not reverse the ruling of the court on denial of the penalty. *People ex rel. Heartburg v. Interstate Eng'g &*

*Constr. Co.*, 58 Idaho 457, 75 P.2d 997 (1937).  
**Collateral References.** 52 Am. Jur. 2d, Logs and Timber, §§ 87-92.  
 54 C.J.S., Logs and Logging, § 59.

**45-402. Lien on lumber made from saw logs.** — Every person performing labor upon, or who shall assist in manufacturing saw logs into lumber, has a lien upon such lumber while the same remains at the mill where manufactured, whether such work or labor was done at the instance of the owner of such logs or of his agents. [1893, p. 49, ch. 2, § 2; reen. 1899, p. 147, ch. 2, § 2; reen. R.C. & C.L., § 5126; C.S., § 7357; I.C.A., § 44-402.]

**Sec. to sec. ref.** This section is referred to in §§ 45-405 and 45-407.

#### Construction.

Lien for services rendered in connection with hauling gravel and placing the gravel on mill yard site of the bankrupt, to facilitate stacking of lumber for drying and enable bankrupt to transport the logs to the mill, was not a lien for work, labor and services performed in logging or in manufacturing saw logs into lumber. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

"At the mill" does not mean exclusively "contiguous to" or "attached to" the mill, but may mean "near," "in the vicinity of," or "connected with" the mill. *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

Lumber and railroad ties sawed at sawmill and taken directly from mill to lumber yard, six miles away, which yard was the only one used in connection with the mill and the only

one controlled by operators of mill, remained "at the mill where manufactured." *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

Railroad ties sawed at sawmill in same manner as other lumber are "lumber," as the term is used in this section, and not "other timber," as used in § 45-403. *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

An electrician who was personally employed by the owners of mill, and who personally performed work, was a "person," under the loggers' lien statute. *Boone v. P & B Logging Co.*, 88 Idaho 111, 397 P.2d 31 (1964).

Where, during construction of mill, electrician ran conduits, installed lighting and connected motors, but did no maintenance or repair work connected with operation of the mill, his labor clearly entitled him to a lien on the mill, property of his employer, under § 45-501, but not a logger's lien under this section. *Boone v. P & B Logging Co.*, 88 Idaho 111, 397 P.2d 31 (1964).

**45-403. Lien for purchase price upon logs.** — Any person who shall permit another to go upon his timber land and cut thereon saw logs, spars, piles, cord wood or other timber, has a lien upon such logs, spars, piles, cord wood and timber, for the price agreed to be paid for such privilege, or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price. [1893, p. 49, ch. 2, § 3; reen. 1899, p. 147, ch. 2, § 3; reen. R.C. & C.L., § 5127; C.S., § 7358; I.C.A., § 44-403.]

**Sec. to sec. ref.** This section is referred to in §§ 45-406 and 45-408.

#### ANALYSIS

Application of payment.

Construction.

Filing with lumber inspector.

Waiver.

#### Application of Payment.

In bankruptcy proceeding involving the state's claim of lien against nonwarehoused logs and lumber, for the sales price of the

timber involved, substantial evidence supported referee's finding that payment of stumpage under the bankrupt's contract was erroneous. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

#### Construction.

The language of lien statutes in regard to timber cut into logs and removal of slash does not require that the lienor assert his lien against any particular parcel or parcels of lumber. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).



**Filing with Lumber Inspector.**

Claim of lien is not void between parties because not filed with lumber inspector as required by § 38-911 (repealed). *Schultz v. Rose Lake Lumber Co.*, 27 Idaho 528, 149 P. 726 (1915).

nonwarehoused logs and lumber, but not against remainder of the lumber on the debtor's premises, such was not a waiver of the right to collect the entire sum due. *Diamond Nat'l Corp. v. Lee*, 333 F.2d 517 (9th Cir. 1964).

**Waiver.**

Where state claimed a lien against

**45-404. Liens preferred to other liens.** — The liens provided for in this chapter are prior to any other liens, and no sale or transfer of any saw logs, spars, piles, cord wood or other timber or manufactured lumber shall divest the lien thereon as herein provided, and such lien shall follow such property into any county in this state into which the same may be removed: provided, notice of such lien shall have been filed in such county. [1893, p. 49, ch. 2, § 4; reen. 1899, p. 147, ch. 2, § 4; reen. R.C. & C.L., § 5128; C.S., § 7359; I.C.A., § 44-404.]

**Collateral References.** 54 C.J.S., *Logs and Logging*, § 73.

**45-405. Time for filing lien for work or labor.** — The person rendering the service or doing the work or labor named in sections 45-401 and 45-402 is only entitled to the liens as provided herein for services, work or labor, for the period of eight (8) calendar months next preceding the filing of the claim, as provided in section 45-407. [1893, p. 49, ch. 2, § 5; reen. 1899, p. 147, ch. 2, § 5; reen. R.C. & C.L., § 5129; C.S., § 7360; I.C.A., § 44-405.]

**Sec. to sec. ref.** This section is referred to in § 45-412.

**45-406. Time for filing liens for purchase price.** — The person granting the privilege mentioned in section 45-403 is entitled to the lien as provided therein for saw logs, spars, piles, cord wood and other timber, cut during the eight (8) months next preceding the filing of the claim, as provided in the next succeeding section. [1893, p. 49, ch. 2, § 6; reen. 1899, p. 147, ch. 2, § 6; reen. R.C. & C.L., § 5130; C.S., § 7361; I.C.A., § 44-406.]

**Sec. to sec. ref.** This section is referred to in § 45-412.

**45-407. Claim of lien for work or labor.** — Every person, within sixty (60) days after the close of the rendition of the services, or after the close of the work or labor mentioned in sections 45-401 and 45-402, Idaho Code, claiming the benefit hereof, must file for record with the county recorder of the county in which such saw logs, spars, piles, cordwood or other timber was cut, or in which such lumber was manufactured, or, if removed to another county, then in such county, a notice of claim containing a statement of his demand, and the amount thereof, after deducting, as near as possible, all just credits and offsets, with the name of the person by whom he was

employed. The notice of claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien, sufficient for identification, with reasonable certainty, which notice of claim must be verified by the oath of himself, his agent or attorney, to the effect that the affiant believes the same to be true. Such notice of claim shall be substantially in the following form:

.... claimant, vs. ....

Notice is hereby given that .... of .... county, state of Idaho, claims a lien upon a .... of .... being about .... in quantity, which were cut in .... county, state of Idaho, are marked thus ...., and are now lying in .... for labor performed upon and assistance rendered in .... said ....; that the name of the owner or reputed owner is ....; that .... employed said .... to perform such labor and render such assistance upon the following terms, to wit: The said .... agreed to pay the said .... for such labor and assistance ....; that said contract has been faithfully performed and fully complied with on the part of said ...., who performed labor upon and assisted in .... said .... for the period of .... that said labor and assistance were so performed and rendered upon said .... between the .... day of .... and the .... day of ...., and the rendition of said services was closed on the .... day of .... and .... days have not elapsed since that time; that the amount of claimant's demand for said services is ....; that no part thereof has been paid except ...., and there is now due and unpaid thereon, after deducting all just credits and offsets, the sum of ...., in which amount he claims a lien upon said ....

State of Idaho, .... county, ss.

...., being first duly sworn, on oath says that he is .... named in the foregoing claim, has heard the same read and knows the contents thereof, and believes the same to be true ....

Subscribed and sworn to before me this .... day of ...., ..... [1893, p. 49, ch. 2, § 7; reen. 1899, p. 147, ch. 2, § 7; reen. R.C. & C.L., § 5131; C.S., § 7362; I.C.A., § 44-407; am. 2002, ch. 32, § 17, p. 46.]

**Compiler's notes.** Sections 16 and 18 of S.L. 2002, ch. 32, are compiled as §§ 43-2532 and 45-519, respectively.

**Sec. to sec. ref.** This section is referred to in §§ 38-123 and 45-405.

**Cited in:** Beckstead v. Griffith, 11 Idaho 738, 83 P. 764 (1906); Church v. Roemer, 94 Idaho 782, 498 P.2d 1255 (1972).

#### ANALYSIS

Description of property.  
Description of work or labor.  
Filing with lumber inspector.  
Oral notice.  
Single claim sufficient.  
Substantial compliance.  
Sufficient service.

#### Description of Property.

The description in the notice of lien was sufficient in that it stated the property as a stated number of board feet cut and lying in a named county even though it does not recite

what species of timber the logs were cut from, identification being a matter of proof. Turnboo v. Keele, 86 Idaho 101, 383 P.2d 591 (1963).

The description of the property to be charged with the lien is required to be only such as will be "sufficient for identification." If there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it will be sufficient. Turnboo v. Keele, 86 Idaho 101, 383 P.2d 591 (1963).

#### Description of Work or Labor.

Liens are not defective because the notices do not set forth the specific type of farm work performed in harvesting the crops; thus, a claim upon the crops "for labor performed, assistance rendered and expenses incurred" provides language meeting the essential requirements of § 45-302 and this section. Sage v. Richtron, Inc., 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).



**Filing with Lumber Inspector.**

Claim of lien not void as against parties thereto by reason of not being recorded by lumber inspector under § 38-911 (repealed). *Schultz v. Rose Lake Lumber Co.*, 27 Idaho 528, 149 P. 726 (1915).

**Oral Notice.**

Oral advice of a claim of lien is not a sufficient compliance with this section. *Ashley Glass Co. v. Hoff*, 123 Idaho 544, 847 P.2d 1171 (1993).

**Single Claim Sufficient.**

Where laborer seeks lien against manufactured product for work done under both §§ 45-401 and 45-402, he need not segregate the two amounts, but may file one claim for both. *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924).

**45-408. Claim of lien for purchase price.** — Every person mentioned in section 45-403 claiming the benefit hereof, must, within ninety (90) days after such cutting, file for record with the county recorder of the county in which such saw logs, spars, piles, cord wood or other timber was cut, a claim in substance the same as provided in the next preceding section, and verified as therein provided. [1893, p. 49, ch. 2, § 8; reen. 1899, p. 147, ch. 2, § 8; reen. R.C. & C.L., § 5132; C.S., § 7363; I.C.A., § 44-408.]

**45-409. Record of claims.** — The county recorder must record any claim filed under this chapter in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments. [1893, p. 49, ch. 2, § 9; reen. 1899, p. 147, ch. 2, § 9; reen. R.C. & C.L., § 5133; C.S., § 7364; I.C.A., § 44-409.]

**45-410. Duration of lien.** — No lien provided for in this chapter binds any saw logs, spars, piles, cord wood or other timber, or any lumber, for a longer period than six (6) calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court within that time to enforce the same. [1893, p. 49, ch. 2, § 10; reen. 1899, p. 147, ch. 2, § 10; reen. R.C. & C.L., § 5134; C.S., § 7365; I.C.A., § 44-410.]

**Parties Added After Six Months.**

In considering a contention challenging the sufficiency of compliance with statutory requisites, the court held that a substantial compliance in good faith meets such requirement; that the provisions of the lien statutes must

**Substantial Compliance.**

In considering a contention challenging the sufficiency of compliance with statutory requisites, the court held that a substantial compliance in good faith meets such requirement; that the provisions of the lien statutes must be liberally construed in favor of the claimant with a view to effect their object and promote justice. *Turnboo v. Keele*, 86 Idaho 101, 383 P.2d 591 (1963).

**Sufficient Service.**

To be effective, a copy of a mechanic's or materialman's lien must be served on the "owner or reputed owner" within 24 hours of its being filed. *Ashley Glass Co. v. Hoff*, 123 Idaho 544, 847 P.2d 1171 (1993); *Ashley Glass Co. v. Hoff*, 123 Idaho 544, 850 P.2d 193 (1993).

be liberally construed in favor of the claimant with a view to effect their object and promote justice. *Turnboo v. Keele*, 86 Idaho 101, 383 P.2d 591 (1963).

**Collateral References.** 54 C.J.S., Logs and Logging, § 71.

**45-411. Rules of practice and appeals.** — Except as otherwise provided in this chapter the provisions of this code relating to civil actions, new trials and appeals are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter. [1893, p. 49, ch. 2, § 11; reen.

1899, p. 147, ch. 2, § 11; reen. R.C. & C.L., § 5135; C.S., § 7366; I.C.A., § 44-411.]

**Cross ref.** Appeals, §§ 13-201 — 13-203.

New trials, I.R.C.P., Rule 59(a).

**Cited in:** Nohrnberg v. Boley, 42 Idaho 48,

246 P. 12 (1925); Burlile v. Leith, 47 Idaho

537, 277 P. 428 (1929).

**45-412. Enforcement against whole or part of property.** — Any person who shall bring a civil action to enforce the lien as herein provided for, or any person having a lien as herein provided for, who shall be made a party to any such civil action, has a right to demand that such lien be enforced against the whole or any part of the saw logs, spars, piles, cord wood or other timber or manufactured lumber, upon which he has performed labor or which he has assisted in obtaining or securing, or which has been cut on his timber land during the eight (8) months mentioned in sections 45-405 and 45-406, for all his labor upon, or for all his assistance in obtaining or securing, said logs, spars, piles, cord wood or other timber, or in manufacturing said lumber during the whole or any part of the eight (8) months mentioned in section 45-405, or for timber cut during the whole or any part of the eight (8) months mentioned in section 45-406. [1893, p. 49, ch. 2, § 12; reen. 1899, p. 147, ch. 2, § 12; reen. R.C. & C.L., § 5136; C.S., § 7367; I.C.A., § 44-412.]

**Cross ref.** Indexes to be kept, § 31-2404.

Recorder's fees, § 31-3205.

**Cited in:** Diamond Nat'l Corp. v. Lee, 333 F.2d 517 (9th Cir. 1964).

#### **Personal Liability.**

A logging company's direct contractual relationship with lessees did not provide a reasonable basis to seek a personal judgment against a lessor, and its sole cause of action

was for payment of logging-related work secured by a loggers' lien. *Montane Resource Assocs. v. Greene*, 132 Idaho 458, 974 P.2d 510 (1999).

**Collateral References.** 54 C.J.S., Logs and Logging, § 77.

Liens covering interests of both owner of land and owner of timber. 26 A.L.R. 1031.

**45-413. Joinder of actions — Filing fees as costs — Attorney's fees.** — Any number of persons claiming liens against the same property under this chapter may join in the same action, and when separate actions are commenced, the court may consolidate them. The court shall also, as part of the cost, allow the moneys paid for filing and recording the claim, and a reasonable attorney's fee for each person claiming a lien. [1893, p. 49, ch. 2, § 13; reen. 1899, p. 147, ch. 2, § 13; reen. R.C. & C.L., § 5137; C.S., § 7368; I.C.A., § 44-413.]

#### **Award Improper.**

Where the plaintiffs were never provided any opportunity to raise a defense to an award of attorney fees the district court erred

in awarding fees to the defendant. *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 987 P.2d 1035 (1999).

**45-414. Enforcement of judgments — Apportionment of proceeds.** — In such civil action judgments must be rendered in favor of each person having a lien for the amount due to him, and the court or judge thereof shall order any property subject to the lien herein provided for, to be sold by the sheriff of the proper county in the same manner that personal



property is sold on execution, and the court or judge shall apportion the proceeds of such sale for the payment of each judgment pro rata, according to the amount of such judgment. [1893, p. 49, ch. 2, § 14; reen. 1899, p. 147, ch. 2, § 14; reen. R.C. & C.L., § 5138; C.S., § 7369; I.C.A., § 44-414.]

**45-415. Property may be sold as personalty.** — The court or judge may order any property subject to a lien as in this chapter provided, to be sold by the sheriff as personal property is sold on execution, either before or at the time judgment is rendered as provided in the section next preceding, and the proceeds of such sale must be paid into court to be applied as in such section directed. [1893, p. 49, ch. 2, § 15; reen. 1899, p. 147, ch. 2, § 15; reen. R.C. & C.L., § 5139; C.S., § 7370; I.C.A., § 44-415.]

**Cross ref.** Sales on execution, §§ 11-302 — 11-309.

**45-416. Interference with property subject to lien — Liability to lienholder.** — Any person who shall injure, impair or destroy, or who shall render difficult, uncertain or impossible of identification, any saw logs, spars, piles, cord wood or other timber, upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the amount secured by his lien, plus reasonable attorney's fees to be fixed by the court, which may be recovered by civil action against such person. [1893, p. 49, ch. 2, § 16; reen. 1899, p. 147, ch. 2, § 16; reen. R.C. & C.L., § 5140; C.S., § 7371; am. 1923, ch. 156, § 1, p. 227; I.C.A., § 44-416.]

#### ANALYSIS

**Constitutionality.**  
**Purpose.**

#### **Constitutionality.**

This section is not obnoxious to the fourteenth amendment to the federal constitution as depriving anyone of his property without due process of law or denying him the equal protection of the laws. *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914).

#### **Purpose.**

Purpose and intent of this section is to render every person who injures, destroys, or removes any of the property therein described on which a lien exists liable for the amount of claim held against property, or if property be of less value than lien claimed, then it allows claimant the damages which he has sustained by reason of the removal or destruction of the particular property. *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914).

**45-417. Interference with property subject to lien — Penalty — Bond.** — Any person or persons who shall, after the filing for record in the county recorder's office in the county of which said labor was performed, or in which said logs, spars, piles, cord wood or other timber are located, of a claim of lien as in this chapter provided, remove, dispose of, injure, impair or destroy or who shall render difficult, uncertain or impossible of identification any such saw logs, spars, piles, cord wood, or other timber products upon which there is a lien as herein provided, or any person or persons who shall aid or assist in doing any of the acts above prohibited shall be guilty of a misdemeanor and upon conviction may be imprisoned in the county jail for not more than six (6) months or shall be fined not less than \$100 nor more than \$300, or shall suffer both such fine and imprisonment in the discretion

of the court, unless prior to such removing, disposing of, injuring, impairing, or destroying, or rendering uncertain or impossible of identification, a bond in double the amount of the lien claim, said bond to be approved by the clerk of the district court and running to the lien claimant or claimants, the condition of said bond being that the owner of said logs or other timber products liened upon will pay any judgment, including costs and reasonable attorney fees to be assessed by the court, rendered in favor of such lien claimant or claimants, shall be filed with the county auditor of the county where said lien is filed or in lieu of said bond, as the case may be, deposit with said auditor a sum equal to double the amount claimed in said lien. [C.S., § 7371A, as added by 1923, ch. 156, § 2, p. 227; I.C.A., § 44-417.]

Cited in: *Turnboo v. Keele*, 86 Idaho 101, 383 P.2d 591 (1963).

## CHAPTER 5

### LIENS OF MECHANICS AND MATERIALMEN

#### SECTION.

- 45-501. Right to lien.
- 45-502, 45-503. [Repealed.]
- 45-504. Lien for improving lots.
- 45-505. Land subject to lien.
- 45-506. Liens preferred claims.
- 45-507. Claim of lien.
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- 45-509. Record of lien claims.
- 45-510. Duration of lien.
- 45-511. Recovery by contractor — Deduction of debts to subcontractors.
- 45-512. Judgment to declare priority.
- 45-513. Joinder of actions — Filing fees as costs — Attorney's fees.
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- 45-515. Action to recover debt.
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- 45-517. Lien for workmen's compensation security.
- 45-518. Release of lien on real property by posting surety bond — Manner.
- 45-519. Release of lien on real property by

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- posting surety bond — Form of bond.
- 45-520. Release of lien on real property by posting surety bond — Petition for release — Service of copy of petition.
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- 45-525. General contractors — Residential property — Disclosures.

**45-501. Right to lien.** — Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who grades, fills in, levels, surfaces or otherwise improves any land, or who performs labor in any mine or mining claim, and every professional engineer or licensed surveyor under contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-site observation or supervision, or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improve-



ment, or to establish boundaries, has a lien upon the same for the work or labor done or professional services or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter.

For purposes of this chapter the term "furnishing material" shall also include, notwithstanding any other provision of law to the contrary, supplying, renting or leasing equipment, materials or fixtures as defined in section 28-12-309, Idaho Code.

"Furnishing material" shall also include renting, leasing or otherwise supplying any equipment, materials, fixtures or machinery to any mine or mining claim. [1893, p. 49, ch. 1, § 1; reen. 1899, p. 147, ch. 1, § 1; reen. R.C. & C.L., § 5110; C.S., § 7339; I.C.A., § 44-501; am. 1951, ch. 199, § 1, p. 422; am. 1971, ch. 91, § 1, p. 196; am. 1998, ch. 269, § 1, p. 898; am. 2001, ch. 152, § 1, p. 550.]

**Compiler's notes.** Section 2 of S.L. 1971, ch. 91 is compiled as § 45-504.

Section 2 of S.L. 2001, ch. 152, is compiled as § 45-504.

**Cross ref.** Employers to post and record statements for protection of mechanics, § 44-501 et seq.

**Sec. to sec. ref.** This chapter is referred to in § 6-2502 and 67-8213.

**Cited in:** *Salisbury v. Lane*, 7 Idaho 370, 63 P. 383 (1900); *Anderson v. Great N. Ry.*, 25 Idaho 433, 138 P. 127, Ann. Cas. 1916C, 191 (1914); *In re Bank of Nampa, Ltd.*, 29 Idaho 166, 157 P. 1117 (1916); *Scogings v. Andreason*, 91 Idaho 176, 418 P.2d 273 (1966); *Craig H. Hisaw, Inc. v. Bishop*, 95 Idaho 145, 504 P.2d 818 (1972); *Dale's Service Co. v. Jones*, 96 Idaho 662, 534 P.2d 1102 (1975); *Bastian v. Gafford*, 98 Idaho 324, 563 P.2d 48 (1977); *First Am. Title Co. v. Design Bldrs., Inc.*, 18 Bankr. 392 (Bankr. D. Idaho 1981); *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985); *Eimco Div. v. United Pac. Ins. Co.*, 109 Idaho 762, 710 P.2d 672 (Ct. App. 1985).

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### **Acknowledgement Required.**

Claims of mechanics' and materialmen's liens filed under Title 45, Chapter 5 of the Idaho Code must be acknowledged in accord with § 55-805 before they are entitled to be recorded, and the "verification" required under § 45-507 does not serve the same purpose or function of an "acknowledgement" and cannot be a substitute therefor; accordingly, liens that were not acknowledged, or were acknowledged but where the certificate of acknowledgment did not substantially comply with Title 55, Chapter 7 of the Idaho Code, were not enforceable against the bankruptcy trustee. *Kloos v. Jacobson*, 30 Bankr. 965 (Bankr. D. Idaho 1983).

### **Agent Having Power to Employ Labor.**

Where a contract for the sale of mining property provided that the purchasers were to complete an objective tunnel on said property to a certain distance within a specified time, it constituted the purchaser of the property an agent of the seller, entitling laborers employed to do the work to file liens on the property. *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936).

### **Agent of Owner.**

Where credit is given to party in possession of a mining claim under an option to purchase and not to owner, no lien is enforceable against owner or his property. *Steel v. Argentine Mining Co.*, 4 Idaho 505, 42 P. 585, 95 Am. St. 144 (1895).

Every contractor, subcontractor, architect, builder, or other person having charge of building, or of its alteration or repair, shall be held to be agent of owner for purposes of lien law. *McGill v. McAdoo*, 35 Idaho 283, 206 P. 1057 (1922); *Boise Payette Lumber Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

Contractor is statutory agent of owner for purpose of giving lien on premises by one who performs labor for contractor, but not for purpose of making laborer employed by contractor the direct contract employee of owner.

*Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Where contract for sale of real estate obligates purchaser to erect building, contract constitutes vendee agent of vendor and latter is person who causes building to be constructed within meaning of statute. *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665 (1928).

In action to foreclose mechanic's lien, claimed for services in superintending construction of mercury ore reduction plant, defendant was not estopped to set up defense that payment was conditional upon success of plant by theory that failure was fault of original contractor as agent of owner. *Smith v. Boyden*, 49 Idaho 638, 290 P. 377 (1930).

The mere relationship of landlord and tenant does not make the tenant the agent of the landlord for the furnishing of material or labor, hence the interest of the landlord is not subject to a mechanic's lien for material and labor furnished under contract with the tenant unless there is consent or ratification thereto by the landlord. *Bunt v. Roberts*, 76 Idaho 158, 279 P.2d 629 (1955).

As a general principle, a tenant is not the "agent" of the landlord, for the purpose of this section, merely by virtue of a lessor-lessee relationship; however, a landlord's interest in real property may be subjected to a lien, for work performed by agreement with the tenant, if the lease specifically requires the tenant to see that the work is done or, alternatively, the landlord's interest may be subjected to a lien if he requests the work to be done. The latter alternative applies to any case where the landlord has done some act in ratification of, or consent to, the work done and the furnishing of material and labor. *Christensen v. Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P.2d 70 (Ct. App. 1983).

Where lease or contract of purchase requires lessee (or vendee) to make certain improvements, then the lessee (or vendee) is said to become the agent of the owner, and in those cases the interest of the owner as well as the interest of the lessee or vendee will become subject to the lien. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

A tenant is not the "agent" of the landlord, for purposes of this section, merely by virtue of a lessor-lessee relationship; the burden of proving agency rests upon the party asserting it. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

### **Attempted Creation by Trespasser.**

One who unlawfully goes into possession of mining property against consent of owner cannot create liens against it, under this section. *Idaho Gold Mining Co. v. Winchell*, 6 Idaho 729, 59 P. 533, 96 Am. St. 290 (1899).



### **At the Instance of the Owner.**

The phrase "at the request of the owner," in § 45-504 has the same meaning as the phrase "at the instance of the owner" in this section. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

The owner's knowledge and acquiescence in improvements are not sufficient to justify charging his interest with a lien; the improvement must have been "requested" by the owner of the land. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

### **Attorney Fees.**

If a contractor is awarded a foreclosure of his materialman's lien, a reasonable attorney fee is an incident thereof. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989).

### **Breach of Contract by Lienholder.**

Where a contractor performed work under a construction contract in an unworkmanlike manner and left the premises in an unfinished condition, he had not substantially performed his contract and was not entitled to foreclosure of his lien. *Nelson v. Hazel*, 89 Idaho 480, 406 P.2d 138 (1965).

### **Breach of Contract by Owner Will Not Defeat Lien Rights.**

Bearing in mind that the lien statute protects a contractor for all labor performed and materials furnished in either contracting or reconstructing a building, and that such statute must be liberally construed with the object in view of promoting justice, the owner of a building, reconstructed by a contractor, cannot deprive him of the protection of the statute by breaching the contract under which the labor was performed and materials furnished, since this would permit the owner to take advantage of, and profit by, his own wrong. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

### **Claim of Materialman.**

In order for a materialman to enforce his lien, it is not necessary for him to attempt to collect the payment from the original contractor before resorting to his lien rights. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

A materialman who furnished building materials to a contractor upon an open running account without designation of any of such materials for any specific job in reliance exclusively upon the credit of the contractor is not entitled to a lien under this section. *Layrite Prods. Co. v. Lux*, 91 Idaho 110, 416 P.2d 501 (1966).

A supplier of materials who, pursuant to agreement with builder of which mortgagee was not cognizant, applied payments received from mortgagee and designated for the current project first to the unpaid balance on a

previous project and refused a tender by the mortgagee of the balance due on the current project was not entitled to a lien on the current project premises. *Mountain Home Redi-Mix v. Conner Homes, Inc.*, 91 Idaho 612, 428 P.2d 744 (1967).

In the absence of oppression or some other circumstances which would have justified denial of a foreclosure on a materialman lien, there was no reason it should not have been granted, even though the contractor failed to establish his right to the full amount claimed and was ultimately awarded a lesser amount. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989).

Supplier of building materials who delivered the materials to another supplier rather than a subcontractor was too remote to the owner of a house that was built to utilize statutory mechanic's lien provisions and foreclose on the house. *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 40 P.3d 96 (2002).

### **Claim of Subcontractor.**

In an action to recover upon a mechanic's lien, although the prime contractor could have filed his lien for the reasonable value of the services performed and pay over the amount due to the subcontractor, the subcontractor could independently file a lien. *Weber v. Eastern Idaho Packing Corp.*, 94 Idaho 694, 496 P.2d 693 (1972).

### **Commencement and Duration of Lien.**

This section, in conjunction with § 45-506, covers liens from the beginning or the commencement of work and the furnishing of materials. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

### **Construction.**

Where, during construction of mill, electrician ran conduits, installed lighting and connected motors, but did no maintenance or repair work connected with operation of the mill, his labor clearly entitled him to a lien on the mill, property of his employer, under this section, but not a logger's lien under § 45-402. *Boone v. P & B Logging Co.*, 88 Idaho 111, 397 P.2d 31 (1964).

Under the statute, the legislature evidently intended to grant the right to claim a lien to any person who contributed labor or materials for the construction, alteration, or repair of a building or structure upon real property. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 41 P.3d 242 (2001).

### **Counterclaim and Setoff.**

Where a counterclaim amounts to a complete setoff against the amount of the lien, the lienholder is not entitled to foreclosure nor attorney's fees. *Dawson v. Eldredge*, 89 Idaho 402, 405 P.2d 754 (1965).

### Extent of Lien.

Rights of lien claimant who is a contractor or subcontractor under the person, company or association which has a Carey Act contract from the state will extend to all rights, interests, claim, and title of such company in and to the works and irrigation system and lands thereunder, but lien claimant cannot, by foreclosure of his lien, acquire any greater right than that possessed by such company or association. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908).

Lien extends only to such right, title and interest as owner had in the property at time lien attached. *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915).

Owners' interest in mining claims is not lienable for work done at instance of their tenant, unless they made him their agent within meaning of the provisions of this section. *Nicholson v. Smith*, 31 Idaho 544, 174 P. 1008 (1918).

Lien against Carey Act irrigation system extends only to such interest as company had therein when lien attached. *Pacific Coast Pipe Co. v. Blaine County Irrigation Co.*, 32 Idaho 705, 187 P. 940 (1920).

### Filing Not a Taking.

The filing of a lien under the mechanics' and materialmen's lien statutes, §§ 45-501 — 45-517, is not a violation of due process since there is no taking of a significant property interest. *Kloos v. Jacobson*, 30 Bankr. 965 (Bankr. D. Idaho 1983).

### Finding Required as to Amount of Ground Necessary for Use.

Where record disclosed no evidence concerning amount of land necessary for convenient use and occupation of dwelling for improvement, of which materials were furnished by lumber company, which foreclosed materialman's lien, finding that the whole of the realty described in complaint was necessary for convenient use of dwelling was error and cause was required to be remanded for the purpose of receiving evidence thereon. *Idaho Lbr. & Hdwe. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

### Findings on Conflicting Evidence Conclusive.

A conflict in the evidence in an action to enforce a materialman's lien will not warrant the overturning of the court's findings. *Idaho Lbr. & Hdwe. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

In an action to foreclose a mechanic's lien for drilling a well, where the evidence was conflicting as to whether the well deviated from the perpendicular, as to whether the casing was broken and the effect of the alleged break upon the purity of the water, the

finding of the court that the work was done in a good and workmanlike manner was conclusive. *Durfee v. Parker*, 90 Idaho 118, 410 P.2d 962 (1965).

### Fuel Costs.

Recovery for fuel is not permissible under the mechanic's lien statute because such is not labor and materials consumed in the process of structurally improving real property. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

### Insurance.

The providing of liability insurance coverage was neither labor nor material that was consumed in the process of structurally improving real property, and a claim for unpaid premiums relating to general liability and equipment insurance was not protected by the state's lien statutes. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

While the legislature has provided protection for the recovery of worker's compensation security in the mechanic's lien laws, it has not so provided for any other form of insurance. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

### Interest on Claims of Laborers.

Interest on claim of laborers is not allowable from the date the work is finished, but is allowable after the expiration of three months from the date of the last item. *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936).

Plaintiff who leveled land of defendant pursuant to oral agreement but without any stipulation as to charges, and who recovered on the basis that a reasonable charge was \$10 a day was entitled to recover interest at legal rate from date work was completed. *Guyman v. Anderson*, 75 Idaho 294, 271 P.2d 1020 (1954).

### Interest on Lien.

Where garnishee judgments were entered against the defendants in an action by several subcontractors to foreclose their materialmen's liens, but the amount deposited with the court by the defendants as full satisfaction of the garnishee judgments was actually less than the amount owed by the defendants, the court did not err in allowing interest to accrue on the lien amounts from the date they became due until the date that the full amounts were paid, since the tendered amount was less than the amount found due by the court and such tender did not estop the accumulation of interest upon any part of the debt. *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982).



**Irrigation Works.**

Irrigation works constructed under the Carey Act are subject to the mechanic's lien law. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

Performance of labor upon irrigation works authorizes lien thereon. *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204 (1912).

Property of irrigation district is not subject to mechanic's lien. *Storey & Fawcett v. Nampa & Meridian Irrigation Dist.*, 32 Idaho 713, 187 P. 946 (1920).

**Judgment for Excess.**

In an action to foreclose a mechanic's lien brought by a subcontractor who furnished labor and materials in connection with the installation of a heating system in a dwelling, the subcontractor was not entitled to a personal judgment against the homeowner for any deficiency which might remain after the foreclosure sale, where the homeowner was not in a direct contractual relationship with the subcontractor. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

**Judgment Not Reversed Because Allegedly Unlienable Item Claimed.**

Where, in his complaint, the contractor alleged, among other things, that the owner employed him to draw plans and specifications for the repair and reconstruction of a residence, and the owner contended that the contractor was not entitled to a lien for this service, a judgment for a lump sum will not be disturbed on appeal when it cannot be determined whether the court actually allowed anything for such service. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

**Judgment Notwithstanding the Verdict.**

Where the district court concluded that an insurer's recovery on its claim of lien was barred by the open account defense because substantial evidence demonstrated that the claimant attributed none of the insured's premiums to its work in Idaho, the court's decision to enter judgment notwithstanding the verdict was affirmed. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

**Labor, Payments Properly Applied to.**

In a lumber company's action to foreclose a materialman's lien, evidence sustained finding that amounts paid by owners of building to lumber company on contractor's demand and placed by company in labor account and paid out to laborers at instance of contractor and upon payroll furnished company by contractor were properly applied to labor account instead of to materials account. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

**Landlord's Interest Subject to Lien.**

Where lease required that the tenants maintain the premises, and that they refrain from any unlawful use of the premises and where the landlord forwarded to the tenants the city electrical inspector's letter enumerating 31 corrections needed in the electrical system on the premises, landlord's interest was lienable on both the ground that the lease specifically required the work in question and on the ground that the landlord's act of forwarding the city's letter to the tenants represented a ratification or a consent for the work to be done. *Christensen v. Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P.2d 70 (Ct. App. 1983).

**Liberal Construction.**

The provisions of this and cognate sections are liberally construed in the favor of the workman to obtain the ends of justice. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

Since the purpose of this section is to compensate persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building or structure, this section will be liberally construed but the statutory requirements must be substantially complied with in order to perfect a valid mechanic's lien. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

**Lienable Items.**

Person employed as foreman and watchman of a mine does not perform services of a professional or supervisory character, so as to preclude him from being entitled to a lien for his services under this section. *Idaho Mining & Milling Co. v. Davis*, 123 F. 396 (9th Cir. 1903).

Lien may be filed to secure profits upon contract when such profits are included in contract. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

Charge for the use of tools in construction work, for which employer agrees to pay, is a lienable item. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

Services performed as superintendent in superintending construction of railroad work constitute a lienable item. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

Lien will be allowed for material furnished and actually used and consumed in the construction of the building or other structure, irrespective of fact that such use and consumption may not be in the main building or structure itself, but was necessarily incident to the carrying on of principal work and discharging of contract. *Chamberlain v. Lewiston*, 23 Idaho 154, 129 P. 1069 (1912).

Lien cannot be allowed for tools and appliances which are the property of contractors and may be used from time to time in other

works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein. *Ninneman v. Lewiston*, 23 Idaho 169, 129 P. 1073 (1912).

Fact that contract contemplates construction of a sewer in connection with and as part of houses built under such contract brings services performed in putting in the sewer within the purview of this section and § 45-504. *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

The lien statutes of Idaho cover the services of a contractor in the reconstruction of a residence, for planning and directing the work incident thereto. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

The Supreme Court of Idaho has held that this statute grants the right to claim a lien for the value of the labor or material furnished and used in or about the construction, alteration or repair of the building, structure or other works. That right of lien is based on the theory that the claimant has, either by his labor or by the materials furnished and used, contributed to the construction or improvement of the property against which the lien is asserted; where the labor is not used or the materials are not incorporated into the building, structure or improvement, no lien on land or building results. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 41 P.3d 242 (2001).

When a materialman delivers the material that was the subject of a lien to the site, the material is presumed to have been used in the project. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 41 P.3d 242 (2001).

#### **Lienable Work.**

The lien statutes would not cover such work as checking over tools and the like, and, therefore, where the filing of the lien was not within the time provided by law for the filing of the same after terminating the work, unless such work be considered, although such work was performed within the time for the filing of the lien, it cannot serve to extend the time to file the lien. *Nelson v. Boise Petro. Corp.*, 54 Idaho 179, 32 P.2d 782 (1934).

#### **Lien Attempted Against Excess Property Not Invalidated.**

The fact that a claim of lien embraces more property than is subject thereto does not work an invalidation of the lien, insofar as the property lawfully subject thereto is concerned, in the absence of fraud or bad faith. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

#### **Lien Held Valid.**

The fact that the amount on a notice of claim and the amount prayed for in a foreclosure complaint differ was not enough to ren-

der a materialman lien invalid. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989).

#### **Lien Prior to Attachment.**

Evidence was sufficient to support a finding that lien claimants were employed from a date certain to the termination of employment on a date subsequent to attachment levy, and that their claims were prior to such levy. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

#### **Lien Right as Property.**

The word "property" as used in former § 18-3101 (repealed 1981) signifies all valuable rights or interest which are protected by law, and a materialman's lien right as provided for by this section is a valuable property right the waiver of which could be held of the obtaining property under false pretenses in a prosecution therefor. *State v. Davis*, 81 Idaho 61, 336 P.2d 692 (1959).

#### **Lien Right for Materials Exists Without Attempt to Collect From Contractor.**

A lumber company which furnished materials to be used in improving owners' dwelling could enforce lien against the building without first seeking payment for the materials from the original contractor. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

#### **Lien Under Sales Contract.**

Where contract of purchase stipulates that purchaser shall erect certain buildings or make certain improvements, lien will attach to and bind interest of vendor, even though vendee forfeits his contract. *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665 (1928).

#### **Materials Furnished but Not Used.**

Where there was sufficient competent evidence to sustain the court's finding that materials were furnished to be used in owners' building, materialman was not required, in order to enforce his lien against the building, to prove that the materials were used upon it. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

An absolute lien is granted upon improved property to persons who furnish material to be used in improving it. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

#### **Nature of Contract as Affecting Lien.**

Materialman who furnished material for erection of building under two separate contracts cannot tack one contract to the other by filing his claim of lien within required time from date of furnishing material pursuant to one of the contracts. *Valley Lbr. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 P. 765, 15 L.R.A. (n.s.) 299, 13 Ann. Cas. 63 (1907); *Mine &*



*Smelter Supply Co. v. Idaho Consol. Mines Co.*, 20 Idaho 300, 118 P. 301 (1911).

Where materials are furnished for same building or improvement in instalments and at intervals, and parties intend them to be included in one account and settlement, the entire account will be treated as a continuous and connected transaction, and time in which to file lien begins to run from the date of the last item of the account. *Valley Lbr. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 P. 765, 15 L.R.A. (n.s.) 299, 13 Ann. Cas. 63 (1907).

Contractor being only a special agent of owner, with limited power, his authority to bind property benefited for payment of value of material extends only to such material as is reasonably and ordinarily sufficient properly to construct or repair building in accordance with the plans and specifications thereof, or in pursuance of the agreement and contract entered into between owner and builder. *Valley Lbr. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 P. 24 (1907).

Agency of contractor only authorizes purchase of, and creates lien for, materials reasonably necessary for buildings, building, or part of building embraced in single contract. *Boise Payette Lbr. Co. v. Felt*, 44 Idaho 377, 258 P. 169 (1927).

#### **Nature of Lien.**

Mechanic's lien is wholly the creature of statute, and while the statutes must be construed liberally with a view to effecting their object and doing substantial justice, they must be taken as they are found. *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942 (D. Idaho 1913); *Continental & Com. Trust & Sav. Bank v. Pacific Coast Pipe Co.*, 222 F. 781 (9th Cir. 1915); *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903); *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665 (1928); *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

Owner of building cannot be personally bound by the act of contractor under this section. Charge becomes one purely in rem and runs against the buildings or structure only. *Valley Lbr. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 P. 24 (1907).

This statute is based on theory that whoever contributes labor or material whereby real property of another is enhanced in value shall be entitled to a lien upon the whole property in the sum due. Extent of lien when he comes to foreclose it must be measured by amount found due him on his contract at time of filing his lien. *Steltz v. Armory Co.*, 15 Idaho 551, 99 P. 98, 20 L.R.A. (n.s.) 872 (1908).

Materialman or laborer is given an absolute lien upon structure or improvement in which material was used or labor done, if he files his claim within the time required by law. *Weeter*

*Lbr. Co. v. Fales*, 20 Idaho 255, 118 P. 289, Ann. Cas. 1913A, 403 (1911).

Intention of parties with reference to the question of a lien is immaterial and nonessential. Essential fact is: Was material furnished or labor performed, and if so, was it furnished or performed in manner and under terms and conditions designated by the statute? If so, party is entitled to lien as matter of law. *Mine & Smelter Supply Co. v. Idaho Consol. Mines Co.*, 20 Idaho 300, 118 P. 301 (1911).

Absolute lien is granted direct upon property, to person who performs labor upon or furnishes materials to be used in the building, structure or other improvement, without reference to whether such person is original contractor, subcontractor, laborer or materialman. *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204 (1912).

It is intent of mechanics' lien law to grant absolute lien upon property to persons who perform labor or furnish material to be used in building or improving such structure. *McGill v. McAdoo*, 35 Idaho 283, 206 P. 1057 (1922); *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

#### **Parol Negotiations Inadmissible.**

In an action to enforce lien, negotiations, resting in parol only, to eliminate part of a contract whereby the purchaser became the agent of the seller of mining property, were not admissible. *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936).

#### **Parties to Foreclosure Suit.**

Other lienors need not be made parties to suit to foreclose mechanic's lien unless plaintiff claims priority over their liens. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

#### **Presumptions.**

When there is a furnishing of materials in the sense of delivery, a rebuttable presumption arises that such materials were actually incorporated into the structure of improvement. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

#### **Property Subject to Lien.**

Party constructing branch or section of a new canal or performing labor thereon in its construction under a contract with owner is entitled to lien upon such branch for any balance due him for such labor and need not claim lien on whole system of canals of which the branch is a part. *Creer v. Cache Valley Canal Co.*, 4 Idaho 280, 38 P. 653, 95 Am. St. 63 (1894).

In order to entitle one to a lien for materials furnished, same must have been used on a particular building; there can be no lien for materials furnished under a general sale.

Colorado Iron Works v. Riekenberg, 4 Idaho 705, 43 P. 681 (1896).

Term "mining claims," as used in this section, includes patented as well as unpatented mining ground. Salisbury v. Lane, 7 Idaho 370, 63 P. 383 (1900).

Where quartz mill is located upon and belongs to a mine and is worked as a part of same, laborer who works as amalgamator in mill and is employed generally in keeping machinery in order, is entitled to a lien on mine for labor which he performs. Thompson v. Wise Boy Mining & Milling Co., 9 Idaho 363, 74 P. 958 (1903).

Where material is furnished contractor for work done on a city lot, under this section construed with § 45-504, lien therefor attaches to lot, as contractor is agent of owner. Shaw v. Johnston, 17 Idaho 676, 107 P. 399 (1910).

Fact that labor performed and material furnished for construction, alteration, and repair of any building, structure or other works was carried away by floods and high water without any fault of man who performed labor and furnished material does not deprive laboring man or materialman from preferring his lien under the statute and such lien attaching to the real estate on which work was done or improvement made. Chamberlain v. Lewiston, 23 Idaho 154, 129 P. 1069 (1912).

Town site is not the subject of a lien under this section. Armitage v. Bernheim, 32 Idaho 594, 187 P. 938 (1919).

This section must be construed in *pari materia* with § 45-505, providing that land on which building is constructed and convenient space about it is also subject to lien. Boise Payette Lumber Co. v. Sharp, 45 Idaho 611, 264 P. 665 (1928).

It is universal rule, in absence of specific provision therefor, that general statutes granting mechanics' liens are not construed to include public buildings. Boise-Payette Lumber Co. v. Challis Independent Sch. Dist. No. 1, 46 Idaho 403, 268 P. 26 (1928).

#### **Release of Liens.**

Trial court properly released liens of record where there was a failure of proof by lienholders to establish their liens. Bunt v. Roberts, 76 Idaho 158, 279 P.2d 629 (1955).

#### **Rental Charges.**

Where leased equipment was not incorporated into, or consumed and destroyed by, a construction project, the rental charge for the equipment could not serve as the basis for a mechanic's or materialman's lien. Great Plains Equip., Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999).

#### **Repair Parts.**

Suppliers of repair parts are not entitled to claim liens under this section. Great Plains

Equip., Inc. v. Northwest Pipeline Corp., 132 Idaho 754, 979 P.2d 627 (1999).

#### **Rights of Subcontractor.**

Subcontractor can acquire no right under his lien that did not exist in original contractor, nor deprive water-right purchasers of their rights under their water contracts. Craig v. Smith, 33 Idaho 590, 196 P. 1038 (1921).

#### **Statute, Knowledge of Not Essential to Lien.**

It is wholly unnecessary for a laborer to know anything about the terms of the statute when he begins the work in order to claim the benefit of the lien law. Hendrix v. Gold Ridge Mines, Inc., 56 Idaho 326, 54 P.2d 254 (1936).

#### **Sufficiency of Complaint.**

Amendment of complaint, in contractor's lien action, to add cause of action for breach of contract was unnecessary since this section requires the work be done or materials furnished "at the instance of the owner of the building or other improvement or his agent" and the allegation of an express or implied contract is contained in the allegation of a mechanic's or materialman's lien in the original complaint. Mitchell v. Flandro, 95 Idaho 228, 506 P.2d 455 (1973).

#### **Sufficiency of Description.**

Where a building is properly identified in the notice of claim of lien, a more general description of the land is sufficient, since the trial court has a reference point from which it may determine what land may be required for the convenient use of the building or structure; however, where there is no structure or one which has been inadequately identified, the notice of claim of lien must contain more particularized language in the description of the land in order to permit the court or interested third persons to identify the property against which the lien is asserted. Chief Indus., Inc. v. Schwendiman, 99 Idaho 682, 587 P.2d 823 (1978).

Where a materialman's notice of claim of lien failed to identify in any way that portion of the 160 acres upon which the building was to have been located and failed to identify in any way the portion of the 160 acres which constituted "a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," the description of the real property in the notice of claim of lien was insufficient for identification of the property sought to be charged. Chief Indus., Inc. v. Schwendiman, 99 Idaho 682, 587 P.2d 823 (1978).

#### **Sufficiency of Evidence.**

Evidence was insufficient to justify judgment foreclosing the contractor's lien. Dybvig v. Willis, 59 Idaho 160, 82 P.2d 95 (1938).



Evidence sustained finding that, at special instance of contractor, lumber company furnished material for use in repairing owners' dwelling, as against contention that the materialman was principal, on whose behalf contractor acted, and was not entitled to benefit of materialmen's lien law for material furnished because of failure to complete the contract to repair. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

Workman is entitled to lien though he does not establish full amount of alleged claim. *Guyman v. Anderson*, 75 Idaho 294, 271 P.2d 1020 (1954).

Section 45-605 requiring claimant to establish full amount of claim in order to recover a penalty does not apply to suit to foreclose mechanic's lien, since lien is for security and is not a penalty. *Guyman v. Anderson*, 75 Idaho 294, 271 P.2d 1020 (1954).

#### **Tenant Contracting for Work.**

Liens could not be foreclosed against tenant who contracted for material and labor where there was no proof that he had a tenant's interest in the real estate. *Bunt v. Roberts*, 76 Idaho 158, 279 P.2d 629 (1955).

No lien was acquired against landlord's interest where the evidence showed that work, labor and material were furnished solely at the request of the tenant. *Bunt v. Roberts*, 76 Idaho 158, 279 P.2d 629 (1955).

Where the "authorization" given by lessor for alterations to his property really amounted only to consent to have lessee expend approximately \$40,000 in remodeling effort, contractor never looked to nor relied upon lessor for any part of the remodeling cost until after it had done the work and lessee had failed to pay for it, and lessee expected to exercise his option to purchase at a predetermined price which was consistent with the value of the premises and lots before the remodeling, it could be said that only the lessee expected to gain from the improvements, and the district court did not err in denying a lien against lessor's interest in the property. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

Where lease gave lessee the right to make improvements, but did not give any corresponding right to lessor to require any particular improvement, it could not be said as a matter of law that the work done and materials furnished were made "at the instance of" the lessor. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

#### **Time Book Admissible in Evidence.**

A time book is admissible in evidence for whatever it may show respecting the number of hours of labor and number of men who worked upon a building sought to be subjected to the lien; and an objection that it does not

show the contractor's time or material furnished is unavailing. *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938).

#### **Time for Filing.**

After substantial completion of building, lienor cannot extend time of lien by unreasonably or purposely delaying completion in some unimportant detail. *Gem State Lbr. Co. v. Witty*, 37 Idaho 489, 217 P. 1027 (1923).

Where time for filing lien would otherwise have lapsed and claimant relies upon delivery of additional material, it must not only be shown that material was actually used but was reasonably necessary to complete building according to terms of contract. *Gem State Lbr. Co. v. Witty*, 37 Idaho 489, 217 P. 1027 (1923).

#### **Waiver of Lien.**

Intention to waive must clearly appear, and will not be presumed or implied. *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915).

Where a property owner secured a lien waiver from a subcontractor furnishing labor and materials for the construction of a dwelling and consideration for subcontractor's execution of the lien waiver was the promise of payment in full, upon the failure of subcontractor to receive payment his purported waiver was of no effect. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

#### **Who Entitled to Lien.**

Purpose of statute is to compensate anyone who performs labor upon, or furnishes, material to be used in construction, alteration, or repair of building or structure. *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

Although corporation is "a person" within statutory contemplation, it is not entitled to laborer's lien within meaning of this section. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Words "every person who shall perform labor" designate ordinary laborers who perform actual physical toil and do not include that higher and better paid class of employees whose duties are confined to superintendence and management, unless such class is expressly mentioned in statute. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Where a laborer is employed to be the superintendent and manager, in looking after, and taking care of, property and to plan, inspect and help with work when necessary, he and such labor come within the provisions of this section. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

#### **Work Must Be Performed to Assert Lien.**

During the time an employee held himself in readiness to perform labor, although he

may recover therefor, he cannot file a lien within the time required by law where that is the last work performed, and, since it is unlienable, it cannot be considered in determining the time within which a lien must be filed. *Nelson v. Boise Petro. Corp.*, 54 Idaho 179, 32 P.2d 782 (1934).

If an employer desires to keep a laborer in his employ, regardless of whether he is performing labor all the time or not, he may do so, but he cannot escape liability to pay wages during the time work is not being done. But because the employee is not employed in the performance of labor, as contemplated by the statute, he is not entitled to a lien to secure his wages during the time he is idle. *Nelson v. Boise Petro. Corp.*, 54 Idaho 179, 32 P.2d 782 (1934).

**Collateral References.** 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 24-28, 48-174, 245-247, 256-264.

56 C.J.S., *Mechanics' Liens*, §§ 17-119.

Knowledge of the owner of improvements or repairs intended, or in process, under orders of the lessee as "consent" which will subject the owner's interest to mechanics' liens. 4 A.L.R. 685.

Freight charges as within a mechanic's lien statute for labor or materials. 30 A.L.R. 466.

Mechanics' liens for buildings erected by a licensee. 45 A.L.R. 581.

Mechanics' liens for services of a person supervising construction of a building, or of an architect. 60 A.L.R. 1257.

Removal or demolition of a building or other structure as the basis for a mechanic's lien. 63 A.L.R. 1250; 74 A.L.R.3d 386.

What amounts to a waiver of a mechanics' lien. 65 A.L.R. 282.

Preexisting indebtedness of a contractor to an owner as affecting right of a laborer to a mechanic's lien. 68 A.L.R. 1263.

Right of one paying or assuming the obligation to pay a laborer or materialman to a mechanic's lien. 74 A.L.R. 522.

Effect of an agreement for payment in property other than money on a mechanic's lien. 81 A.L.R. 766.

Right of one other than a contractor, laborer, or materialman to file a mechanic's lien. 83 A.L.R. 11.

Dating a mechanic's lien from the time

when the contractor commenced work or the time when labor or material for which the lien is claimed was furnished. 83 A.L.R. 925.

Vendee as contractor within the provisions of a mechanic's lien law which limits liens for materials or labor furnished to contractor to the amount earned but unpaid on the contract. 83 A.L.R. 1152.

Rights and remedies under a lien statute of one performing work only part of which is of a lienable character. 149 A.L.R. 682.

Nature of work, sufficiency of notice, claim or statement of mechanic's lien. 27 A.L.R.2d 1169.

Grading, clearing, filling, excavating, and the like. 39 A.L.R.2d 866.

Right to mechanic's lien upon leasehold for supplying labor or material in attaching or installing fixtures. 42 A.L.R.2d 685.

Water well-drilling contract, work under. 90 A.L.R.2d 1422.

Waiver of lien, taking or negotiation of unsecured note of owner or contractor. 91 A.L.R.2d 425.

Swimming pool as lienable item within mechanic's lien statute. 95 A.L.R.2d 1371.

"Commencement of building or improvement" for purposes of determining accrual of lien, what constitutes. 1 A.L.R.3d 822.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien. 3 A.L.R.3d 573.

Surveyor's work as giving rise to right to mechanic's lien. 35 A.L.R.3d 1391.

Sufficiency of designation of owner in notice, claim, or statement of mechanic's lien. 48 A.L.R.3d 153.

Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanic's lien or as extending time for filing such a lien. 51 A.L.R.3d 1087.

Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold. 59 A.L.R.3d 278.

Priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code. 69 A.L.R.3d 1162.

Architect's services as within mechanics' lien statute. 31 A.L.R.5th 664.

## 45-502, 45-503. Contracts for public works — Bond for protection of laborers and materialmen — Bond not provided — Allowance of claim unlawful. [Repealed.]

**Compiler's notes.** These sections, which comprised 1909, p. 165, §§ 1, 2; reen. C.L. §§ 5111a, 5111b; C.S., §§ 7341, 7342; am. 1929, ch. 254, § 1, p. 518; I.C.A., §§ 44-502,

44-503; am. 1933, ch. 164, § 1, p. 292, were repealed by S.L. 1965, ch. 28, § 7. For present law see §§ 54-1925 — 54-1930.



**45-504. Lien for improving lots.** — Any person who, at the request of the owner of any lot in any incorporated city or town, surveys, grades, fills in, or otherwise improves the same, or who rents, leases or otherwise supplies equipment, materials or fixtures as defined in section 28-12-309, Idaho Code, to such person for the improvement of any lot, or the street in front of or adjoining the same, has a lien upon such lot for his work done or material furnished or equipment, materials or fixtures as defined in section 28-12-309, Idaho Code, rented, leased or otherwise supplied. [1893, p. 49, ch. 1, § 3; reen. 1899, p. 147, ch. 1, § 3; reen. R.C. & C.L., § 5112; C.S., § 7343; I.C.A., § 44-504; am. 1971, ch. 91, § 2, p. 196; am. 2001, ch. 152, § 2, p. 550.]

**Compiler's notes.** The phrase "at the request of the owner," in this section has the same meaning as the phrase "at the instance of the owner" in § 45-501. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

Section 1 of S.L. 2001, ch. 152, is compiled as § 45-501.

#### ANALYSIS

##### Application.

Lienable items.

Lien under sales contract.

"Request" construed.

##### Application.

If a contractor constructs sidewalk in front of city lot, on a street, he is, under § 45-501, to be deemed agent of owner, and under this section lien for materials furnished contractor attaches to the lot. *Shaw v. Johnston*, 17 Idaho 676, 107 P. 399 (1910).

Reputed owner, as such, has no right to do anything which would give a lien under this section. *Parker v. Northwestern Inv. Co.*, 44 Idaho 68, 255 P. 307 (1927).

##### Lienable Items.

Where contract calls for sewer construction in connection with certain houses, claim for

labor and material furnished is lienable under this section. *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

##### Lien Under Sales Contract.

Work done on land for party holding contract for purchase thereof did not entitle person doing work to lien on land as against owner. *Parker v. Northwestern Inv. Co.*, 44 Idaho 68, 255 P. 307 (1927).

Where sewer construction was done at instance and request of vendee in possession, with knowledge of vendor, and subsequently vendee became owner by completing his contract, mechanic's lien attached in suit to foreclose lien. *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

##### "Request" Construed.

The phrase "at the request of the owner," in this section has the same meaning as the phrase "at the instance of the owner" in § 45-501. *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647 (Ct. App. 1985).

**Collateral References.** Equitable liens on real property in favor of one who makes advances or expenditures for purpose of improvements. 89 A.L.R. 1455.

**45-505. Land subject to lien.** — The land upon which or in connection with which any professional services are performed or any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the furnishing of professional services or other work, the furnishing of the material, or the renting, leasing or otherwise supplying of equipment, materials or fixtures as defined in section 28-12-309, Idaho Code, for the same, the land belonged to the person who caused said professional services to be performed or said building, improvement or structure to be constructed, altered or repaired, or such person was acting as the agent of the owner, but if such person owns less than a fee simple estate in such land, then only the interest of the

person or persons causing the services or improvement therein is subject to such lien. [1893, p. 49, ch. 1, § 4; reen. 1899, p. 147, ch. 1, § 4; reen. R.C. & C.L., § 5113; C.S., § 7344; I.C.A., § 44-505; am. 1971, ch. 91, § 3, p. 196; am. 2001, ch. 152, § 3, p. 550.]

**Cited in:** Creer v. Cache Valley Canal Co., 4 Idaho 280, 38 P. 653, 95 Am. St. 63 (1894); Steel v. Argentine Mining Co., 4 Idaho 505, 42 P. 585, 95 Am. St. 144 (1895); Weeter Lbr. Co. v. Fales, 20 Idaho 255, 118 P. 289, Ann. Cas. 1913A, 403 (1911); Nicholson v. Smith, 31 Idaho 544, 174 P. 1008 (1918); Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co., 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984); Bouten Constr. Co. v. H.F. Magnuson Co., 133 Idaho 756, 992 P.2d 751 (1999).

#### ANALYSIS

Amount of land for use must be determined.  
Application and construction.  
Complaint need not allege amount of land required.  
Determination of necessary land.  
Extent of lien.  
Foreclosure of lien.  
Lien under sales contract.  
Property subject to lien.  
Reliance on credit of the land.  
Sufficiency of identification.

#### **Amount of Land for Use Must Be Determined.**

Under this section, it is necessary that the court determine the amount of land around the structure required for its convenient use and occupation and, therefore, subject to the lien, and where the court has so failed to do, the case will be remanded to the trial court with instructions to determine such amount of land and make proper findings. Dybvig v. Willis, 59 Idaho 160, 82 P.2d 95 (1938); Idaho Lbr. & Hdw. Co. v. DiGiacomo, 61 Idaho 383, 102 P.2d 637 (1940).

#### **Application and Construction.**

Where one party makes improvements on land with consent of owner and under license from option holder on property, there can result no lien against such property in possession of original owner. Boise Payette Lbr. Co. v. Bickel, 42 Idaho 245, 245 P. 92, 45 A.L.R. 575 (1926).

One constructing buildings on land owned by another is bound to take notice of owner's record title, when it comes to enforcing his lien against property. Boise Payette Lbr. Co. v. Bickel, 42 Idaho 245, 245 P. 92, 45 A.L.R. 575 (1926).

This section must be construed in *pari materia* with § 45-501. Boise Payette Lumber Co. v. Sharp, 45 Idaho 611, 264 P. 665 (1928).

#### **Complaint Need Not Allege Amount of Land Required.**

In an action to enforce a contractor's lien, it is unnecessary for the complaint to plead the amount of land required for the convenient use and occupation of the property. Robertson v. Moore, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, Dover Lumber Co. v. Case, 31 Idaho 176, 170 P. 108 (1918); Dybvig v. Willis, 59 Idaho 160, 82 P.2d 95 (1938).

#### **Determination of Necessary Land.**

It is error for court in decreeing foreclosure of mechanic's lien to fail to find amount of land necessary for the convenient use of the property to be sold. Robertson v. Moore, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, Dover Lumber Co. v. Case, 31 Idaho 176, 170 P. 108 (1918); Dybvig v. Willis, 59 Idaho 160, 82 P.2d 95 (1938).

Judgment of foreclosure was not sustained by evidence where findings of fact were based upon a surveyor's report as to the amount of land necessary for convenient use of the barn but no testimony of the surveyor was taken at the trial in action brought by contractor for lien on barn, under this section ordering determination of land necessary for use and occupation of building. Mackey v. Eva, 80 Idaho 260, 328 P.2d 66 (1958).

In an action to foreclose a mechanic's lien for drilling a well, where defendant testified that he planned to use the water from the well for culinary use only and there was evidence that he planned to use it to irrigate his entire tract of ground, it was not error for the court to find that the entire tract was required for the convenient use and occupation of the well. Durfee v. Parker, 90 Idaho 118, 410 P.2d 962 (1965).

Where the court found work had been performed on 200 acres of land, indicating that the land had been benefited as a farming unit, the extent of the lien foreclosures on that land was not too broad in that the court failed to find what portion of the land was benefited. Weber v. Eastern Idaho Packing Corp., 94 Idaho 694, 496 P.2d 693 (1972).

Where a building is properly identified in the notice of claim of lien, a more general description of the land is sufficient, since the trial court has a reference point from which it may determine what land may be required for the convenient use of the building or structure; however, where there is no structure or one which has been inadequately identified, the notice of claim of lien must contain more



particularized language in the description of the land in order to permit the court or interested third persons to identify the property against which the lien is asserted. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

#### **Extent of Lien.**

Lien may be foreclosed against interest in real property less than that of fee simple title, as whatever interest debtor may have in property may be foreclosed in action brought for that purpose. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908); *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

#### **Foreclosure of Lien.**

Materialman's lien cannot be foreclosed on land when there is no structure on land for which material was furnished. *Karlson v. National Park Lbr. Co.*, 46 Idaho 595, 269 P. 591 (1928).

Judgment in action to foreclose materialman's lien must determine location and ownership of building, and defendants in such action are estopped from thereafter making any claim to building on theory that location was other than that described in judgment. *Karlson v. National Park Lbr. Co.*, 46 Idaho 595, 269 P. 591 (1928).

Under the provisions of this statute, the court is required to determine the amount of land required for convenient use and occupation of the property to be sold and this cannot be extended to reach realty afterwards acquired by the defendant unless so determined by the court. *Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

In mechanic's lien foreclosure where two judgment claimants assigned their judgments to another judgment claimant and heirs of deceased owner assigned their interest to same assignee so as to cause a merger of the liens with the title, an unassigned recorded judgment of another claimant is a cloud on the title which must be removed to render same marketable. *Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

The statutory provision that judgments become liens on all property judgment debtor has at the time of rendition or that he may thereafter acquire is not applicable to judgment foreclosing mechanics' lien. *Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

#### **Lien Under Sales Contract.**

Where contract of sale required construction of building by vendee, not only buildings, but vendor's interest in land, was subject to lien. *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665 (1928).

If vendee has not completed his purchase, lien attaches only to vendee's interest.

*Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

Judgment rendered on complaint alleging that materials were furnished to vendee under sales contract for construction of buildings on premises, with the knowledge and consent of vendor, was not subject to collateral attack. *United States Nat. Bank v. Humphrey*, 49 Idaho 363, 288 P. 416 (1930).

#### **Property Subject to Lien.**

Townsite is not the subject of a lien under this section. *Armitage v. Bernheim*, 32 Idaho 594, 187 P. 938 (1919).

The land upon which a lien may be asserted is expressly referenced to and made dependent upon the location of the building, structure or improvement; therefore, a lien may not be acquired against the land if one cannot be acquired against the building, structure or other improvement. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

A claim of lien is not invalid simply because it describes more property than is properly subject to the lien; so long as there is no fraudulent intent on the part of the lien claimant and no one is injured by the overly broad property description, the land properly subject to the lien is for the court to determine, after hearing all the evidence. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985).

#### **Reliance on Credit of the Land.**

To obtain a lien against the land upon which the improvement is constructed, the lien claimant must have relied upon the credit of the land for payment and not merely on the personal credit of the purchaser. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985).

#### **Sufficiency of Identification.**

Where a materialman's notice of claim of lien failed to identify in any way that portion of the 160 acres upon which the building was to have been located and failed to identify in any way the portion of the 160 acres which constituted "a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," the description of the real property in the notice of claim of lien was insufficient for identification of the property sought to be charged. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

**Collateral References.** 56 C.J.S., *Mechanics' Liens*, §§ 211-219.

Common-law lien on owner's premises for work performed on personalty located on such premises. 3 A.L.R. 862.

Right of seller of fixtures retaining title or

as a lien, as against the holder of mechanics' lien against property. 13 A.L.R. 459; 73 A.L.R. 748; 88 A.L.R. 1318; 111 A.L.R. 362; 141 A.L.R. 1283.

After-acquired title as supporting a mechanics' lien. 52 A.L.R. 693.

Church property as subject to mechanics' lien. 85 A.L.R. 953.

Right to impose mechanics' lien against fee of property for work or material furnished under contract with a life tenant. 97 A.L.R. 870.

Lessee as agent of lessor within the meaning of mechanics' lien laws. 163 A.L.R. 992.

Description or location of real property,

sufficiency of notice, claim, or statement of mechanic's lien with respect to. 52 A.L.R.2d 12.

Sale of real property as affecting time for filing notice of or perfecting mechanic's lien as against purchaser's interest. 76 A.L.R.2d 1163.

Effect on purchaser's interest of mechanics' lien for labor or material furnished under a contract with the vendor pending an executory contract for sale of the property. 50 A.L.R.3d 944.

Enforceability of single mechanic's lien upon several parcels against less than the entire property lien. 68 A.L.R.3d 1300.

**45-506. Liens preferred claims.** — The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished. [1893, p. 49, ch. 1, § 5; reen. 1899, p. 147, ch. 1, § 5; reen. R.C. & C.L., § 5114; C.S., § 7345; I.C.A., § 44-506; am. 1971, ch. 91, § 4, p. 196; am. 2001, ch. 152, § 4, p. 550.]

**Cited in:** *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942 (D. Idaho 1913); *Continental & Com. Trust & Sav. Bank v. Pacific Coast Pipe Co.*, 222 F. 781 (9th Cir. 1915); *First Am. Title Co. v. Design Bldrs., Inc.*, 18 Bankr. 392 (Bankr. D. Idaho 1981).

Idaho 403, 55 P.2d 152 (1936).

#### **Liberal Construction.**

Statutes governing mechanic's and laborer's liens are to be liberally construed so as to effect their objects and to promote justice. *Metropolitan Life Ins. Co. v. First Security Bank*, 94 Idaho 489, 491 P.2d 1261 (1971).

#### **Priorities.**

Where owner of property, after entering into a contract for construction of certain irrigation works thereon, executes a trust deed to property, securing bonds to raise funds wherewith to meet the obligation of the contract, work upon which had already been commenced, mechanic's lien claimed by such contractor is superior in rank to trust deeds securing bonds, and there is no estoppel from claiming such priority where construction company has done nothing to lead bondholders to believe that their lien should be first. *Continental & Com. Trust & Sav. Bank v. Corey Bros. Constr. Co.*, 208 F. 976 (9th Cir. 1913).

All liens for labor commenced and materials commenced to be furnished prior to recording of mortgages or other liens are prior and superior liens to said mortgages or liens

#### **ANALYSIS**

Commencement and duration of lien.

Lien superior to attachment.

Liberal construction.

Priorities.

Time lien attaches.

#### **Commencement and Duration of Lien.**

This section, in conjunction with § 45-501, covers liens from the beginning of work and the furnishing of materials. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

#### **Lien Superior to Attachment.**

Evidence was sufficient to support a finding that lien claimants were employed from a date certain to the termination of the work on a date subsequent to attachment levy, and that their claims were prior to such levy. *White v. Constitution Min. & Milling Co.*, 56



and the liens of all laborers for labor commenced, and materialmen for material commenced to be furnished, subsequent to the recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building. *Boise-Payette Lumber Co. v. Halloran-Judge Trust Co.*, 281 F. 818 (9th Cir. 1922); *Pacific States Sav. Loan & Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905).

Mortgage lien, referring to subsequently acquired property, is subject to mechanics' and materialmen's liens for construction and acquiring of such property. *Pacific Coast Pipe Co. v. Blaine County Irrigation Co.*, 32 Idaho 705, 187 P. 940 (1920).

If mechanic who worked on section of irrigation system elects to file his lien on entire system, it thereby becomes subject to prior mortgage thereon. *Pacific Coast Pipe Co. v. Blaine County Irrigation Co.*, 32 Idaho 705, 187 P. 940 (1920).

Where lien claimant had no notice of mortgage at time labor and material were furnished, and where such mortgage was unrecorded, lien is entitled to superiority. *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929).

It is well settled that the liens of employee's debt, judgment or other encumbrances, including attachment, created subsequent to the time when the labor lien attaches, or subsequent to the time to which the labor lien relates, are inferior to the labor liens. *White v. Constitution Min. & Milling Co.*, 56 Idaho 403, 55 P.2d 152 (1936).

A mortgage lien in the hands of an assignee takes precedence over a mechanic's lien which attached prior to the assignment but subsequent to the execution of the mortgage. *Finlayson v. Waller*, 64 Idaho 618, 134 P.2d 1069 (1943).

Furnishers of material were entitled to relief on basis of cross-complaints where they alleged that bank holding a mortgage on housing project induced cross-complainants not to file their liens for material furnished and it was alleged that cross-complainants had started delivery of material before execution of mortgage, therefore bank profited thereby and cross-complainants were injured as result of reliance upon false statements by bank. *Cooper v. Wesco Builders, Inc.*, 73 Idaho 383, 253 P.2d 226 (1953).

Where the materials involved in the lien were furnished from Feb. 21, 1959, through July 16, 1959, and the mortgage involved was executed, filed and recorded on March 12,

1959, the lien filed against the property on Sept. 15, 1959, was, at the time of its filing, entitled to priority over the mortgage. *Palmer v. Bradford*, 86 Idaho 395, 388 P.2d 96 (1963).

Mechanics' and materialmen's lien was not "choate" and thus did not have priority over federal Farmers Home Administration mortgage where mechanics' lien was not the first filed, was uncertain as to amount and was subject to dissolution if not timely filed and enforced. *Jones v. Lickley*, 453 F. Supp. 44 (D. Idaho 1978).

Using this section and § 45-512 as the mechanism to set the priority of plaintiff's mechanics lien as against the mortgage liens of the Trusts, the district court's review of the mortgage lien on the property held by the Trusts was proper. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

Supreme Court of Idaho refused to overrule prior case law; instead, it confirmed that lien priority depended upon time that labor was commenced or materials were furnished by the claimant. *Ultrawall, Inc. v. Washington Mut. Bank*, 135 Idaho 832, 25 P.3d 855 (2001).

#### Time Lien Attaches.

Lien of subcontractor, with respect to priority over mortgage, held to date back to time subcontractor began work and not to time principal contractor entered into contract. *Boise-Payette Lumber Co. v. Halloran-Judge Trust Co.*, 281 F. 818 (9th Cir. 1922).

Lien for materials and supplies furnished in construction, alteration, or repair of buildings or mining structures or improvements relates back to date of commencing to furnish materials therefor. *Mine & Smelter Supply Co. v. Idaho Consol. Mines Co.*, 20 Idaho 300, 118 P. 301 (1911).

The effective date of labor and materialmen's liens is the date of commencement of the work or improvement or commencing to furnish material. *Metropolitan Life Ins. Co. v. First Security Bank*, 94 Idaho 489, 491 P.2d 1261 (1971).

The priority date of a lien for materials is the date materials were commenced to be furnished; although the claim of lien is usually filed after all the materials have been furnished, the lien relates back to the date on which materials were first furnished by the claimant. The general rule is that such a lien does not attach unless and until the delivery of construction materials to the site. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985).

**45-507. Claim of lien.** — (1) Any person claiming a lien pursuant to the provisions of this chapter must file a claim for record with the county recorder for the county in which such property or some part thereof is situated.

(2) The claim shall be filed within ninety (90) days after the completion of the labor or services, or furnishing of materials.

(3) The claim shall contain:

(a) A statement of his demand, after deducting all just credits and offsets;

(b) The name of the owner, or reputed owner, if known;

(c) The name of the person by whom he was employed or to whom he furnished the materials; and

(d) A description of the property to be charged with the lien, sufficient for identification.

(4) Such claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just.

(5) A true and correct copy of the claim of lien shall be served on the owner or reputed owner of the property either by delivering a copy thereof to the owner or reputed owner personally or by mailing a copy thereof by certified mail to the owner or reputed owner at his last known address. Such delivery or mailing shall be made no later than five (5) business days following the filing of said claim of lien. [1893, p. 49, ch. 1, § 6; am. 1895, p. 48, ch. 1, § 6; reen. 1899, p. 147, ch. 1, § 6; reen. R.C. & C.L., § 5115; C.S., § 7346; I.C.A., § 44-507; am. 1971, ch. 91, § 5, p. 196; am. 1983, ch. 127, § 1, p. 323; am. 1993, ch. 378, § 1, p. 1386; am. 2001, ch. 152, § 5, p. 550; am. 2002, ch. 307, § 1, p. 876.]

**Compiler's notes.** Section 6 of S.L. 1971, ch. 91 is compiled as § 45-512.

Section 2 of S.L. 1993, ch. 378 is compiled as § 45-511.

Section 6 of S.L. 2001, ch. 152, is compiled as § 45-512.

Section 2 of S.L. 2002, ch. 307 is compiled as § 45-525.

**Sec. to sec. ref.** This section is referred to in § 31-1430.

**Cited in:** *Utah Implement-Vehicle Co. v. Bowman* (1913); *Continental & Com. Trust & Sav. Bank v. Pacific Coast Pipe Co.*, 222 F. 781 (9th Cir. 1915); *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925); *Boise Payette Lumber Co. v. Challis Independent Sch. Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928); *Bunt v. Roberts*, 76 Idaho 158, 279 P.2d 629 (1955); *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956); *Jones v. Lickley*, 453 F. Supp. 44 (D. Idaho 1978); *First Am. Title Co. v. Design Bldrs., Inc.*, 18 Bankr. 392 (Bankr. D. Idaho 1981); *W.F. Constr. Co. v. Kalik*, 103 Idaho 713, 652 P.2d 661 (Ct. App. 1982); *Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984); *Weaver v. Millard*, 120 Idaho 692, 819 P.2d 110 (Ct. App. 1991).

#### ANALYSIS

**Acknowledgement.**

**Acknowledgement required.**

**Amount of claim.**

**Attached property.**

**Award of costs.**

**Collateral estoppel.**

**Estoppel of claimant.**

**Filing not a taking.**

**Incorrect property description.**

**Liberal construction.**

**Lien waivers.**

**Proof of claim.**

**Sufficiency of description.**

**Sufficiency of notice.**

**Time for filing.**

**Timely amending of claim.**

**Verification of notice.**

**Work must be performed.**

#### Acknowledgement.

Laborers and materialmen have the right to assert and obtain a lien which need not include an acknowledgement for it to be properly recorded against the property upon which they have performed labor or for which they have furnished materials. *A-J Corp. v. GVR Ltd.*, 107 Idaho 1101, 695 P.2d 1240 (1985).

Where contractor's mechanic's lien stated only that he appeared, was duly sworn, and stated the contents of the lien, the lien did not satisfy the statutory requirements, and it was therefore invalid. *Cornerstone Bldrs., Inc. v. McReynolds*, 136 Idaho 843, 41 P.3d 271 (Ct. App. 2001).

#### Acknowledgement Required.

Claims of mechanics' and materialmens' liens filed under Title 45, Chapter 5 of the



Idaho Code must be acknowledged in accord with § 55-805 before they are entitled to be recorded, and the "verification" required under this section does not serve the same purpose or function of an "acknowledgement" and cannot be a substitute therefor; accordingly, liens that were not acknowledged, or acknowledged but where the certificate of acknowledgement did not substantially comply with Title 55, Chapter 7 of the Idaho Code, were not enforceable against the bankruptcy trustee. *Kloos v. Jacobson*, 30 Bankr. 965 (Bankr. D. Idaho 1983).

#### **Amount of Claim.**

Every person performing labor or furnishing material for building or structure is entitled to a lien therefor, and amount to be recovered under such lien is always measured by amount found to be due him under his contract. *Steltz v. Armory Co.*, 15 Idaho 551, 99 P. 98, 20 L.R.A. (n.s.) 872 (1908).

#### **Attached Property.**

Although the majority of work done was not located on the actual parcel of land for which a mechanic's lien was sought, the lien could properly be maintained where the work was done upon the easement attached to the parcel. *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (Ct. App. 1999).

#### **Award of Costs.**

When a party successfully forecloses on a lien filed pursuant to this section, that party is entitled to an award of the costs associated with the foreclosure pursuant to § 45-513. *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Upon the successful entry of a judgment of foreclosure of a lien claimed under this section, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. In determining the amount, the district court is free to consider the factors of I.R.C.P. 54(e)(3) as well as those considerations which are part of a prevailing party analysis under I.R.C.P. 54(d)(1)(B). *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

#### **Collateral Estoppel.**

The issue involving the mechanic's lien provisions, decided in an earlier state court proceeding, was not identical to the issue presented before the United States Bankruptcy Court. Since the issue presented in the previous litigation must be identical to the present issue for the doctrine of collateral estoppel to apply, the court concluded that collateral estoppel was not applicable. *Koski v. Seattle First Nat'l Bank*, 144 Bankr. 486 (Bankr. D. Idaho 1992).

#### **Estoppel of Claimant.**

Where claimant furnishing labor and materials makes owner of building garnishee in action against contractor, and states in answering garnishee's answer that it has no lien, and garnishee in reliance thereon pays out money it might have retained to satisfy claimant's lien, claimant is estopped to assert lien. *H. W. Johns-Manville Co. v. Allen*, 37 Idaho 153, 215 P. 840 (1923).

#### **Filing Not a Taking.**

The filing of a lien under the mechanics' and materialmen's lien statutes, §§ 45-501 — 45-517, is not a violation of due process since there is no taking of a significant property interest. *Kloos v. Jacobson*, 30 Bankr. 965 (Bankr. D. Idaho 1983).

#### **Incorrect Property Description.**

Where the real property description in a mechanic's lien claim notice is "unambiguously erroneous" and describes with exactitude the wrong parcel of real property, substantial compliance with the statute is not achieved and the claim of lien is invalidated. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).

If the notice of claim of lien has a fatally defective description, there can be no valid lien and no foreclosure proceeding may be based on that notice of claim. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

A claim of lien is not invalid simply because it describes more property than is properly subject to the lien; so long as there is no fraudulent intent on the part of the lien claimant and no one is injured by the overly broad property description, the land properly subject to the lien is for the court to determine, after hearing all the evidence. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985).

#### **Liberal Construction.**

Since the purpose of this section is to compensate persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building or structure, this section will be liberally construed but the statutory requirements must be substantially complied with in order to perfect a valid mechanic's lien. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

#### **Lien Waivers.**

In action involving contract dispute which arose from a remodeling project performed on a residential home by plaintiffs for defendants, lien waiver signed on June 17, 1992, applied only to claims of plaintiffs as of June 17, 1992, since it was found that substantial performance was not completed until June 22, the waiver did not extend to release defen-

dants of any material and labor claims alleged by plaintiffs subsequent to June 17. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

In action involving contract dispute which arose from a remodeling project that plaintiffs performed on residential property for defendants, lien waiver signed by plaintiffs and defendants did not hold defendants harmless from claims of subcontractors where remodeling project differed from other projects performed by plaintiffs for defendant in that in this project plaintiffs did not control or direct the subcontractors as they had in the past and defendants dealt directly with the subcontractors in that they paid several of these contractors directly and directed their work. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

#### **Proof of Claim.**

Rendering of account for labor performed and material furnished for work upon a railroad right of way, which account is accepted and approved by railway company, is sufficient proof of the performance of such labor and furnishing of material used in the construction of such improvement, and authorizes the filing of lien therefor. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

#### **Sufficiency of Description.**

Description is sufficient where property can be identified by it. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Where there was more than one building on lot, claim of lien against building on such lot, but not pointing out which building, is insufficient. *Gem State Lbr. Co. v. Cameron*, 44 Idaho 595, 258 P. 539 (1927).

Where a materialman's notice of claim of lien mentioned the materials supplied in general terms, but at no point did it specifically claim a lien against the materials or describe them adequately for identification, no lien could be sustained against the materials. *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

If there appears enough in the description of the property to be charged with the lien to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984).

Property descriptions contained in liens, which were from two different people familiar with the locality who were able to identify the property with reasonable certainty, constituted substantial compliance with this section. *Great Plains Equip., Inc. v. Northwest*

*Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

#### **Sufficiency of Notice.**

Notice of lien must contain a direct and unequivocal allegation of name of owner; a notice headed "A and B, subcontractors and claimants, v. C, contractor, and D, owner," is insufficient. *White v. Mullins*, 3 Idaho 434, 31 P. 801 (1892).

Notice of claim of lien for construction of canal which states that a certain company is name of owner and is reputed owner of premises therein described, and caused the said canal to be constructed and excavated, is sufficient. *Creer v. Cache Valley Canal Co.*, 4 Idaho 280, 38 P. 653, 95 Am. St. 63 (1894).

Mechanic's lien for construction of canal need not charge or claim lien upon land or right of way. *Creer v. Cache Valley Canal Co.*, 4 Idaho 280, 38 P. 653 (1894).

Statement in lien notice that work was performed and materials furnished upon a certain mining claim, "the property of the defendant," is not a sufficient compliance with this section. *Steel v. Argentine Mining Co.*, 4 Idaho 505, 42 P. 585, 95 Am. St. 144 (1895).

Where work is done upon a group of placer mining claims owned by the same person and commonly known under the same name, description of claims under such common name, together with description of place of location, is sufficient in a notice of lien. *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903).

Notice of lien should contain statement of demand, name of owner or reputed owner, if known, name of person by whom employed, description of property and must be verified. *Robertson v. Moore*, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, *Dover Lumber Co. v. Case*, 31 Idaho 176, 170 P. 108 (1918).

Claim of lien containing no recital of name of owner or person by whom laborer was employed, except recital that certain person was owner or reputed owner of premises, and "caused said labor" is insufficient. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Claimant's failure to name the wife as well as the husband in its claim did not invalidate its lien against community real property. A substantial compliance in good faith meets the statutory requirement. *Layrite Prods. Co. v. Lux*, 86 Idaho 477, 388 P.2d 105 (1964).

#### **Time for Filing.**

Fact that it was not shown that claimant had ceased to perform his duties at time of filing of his claim for lien did not invalidate his claim. *Idaho Mining & Milling Co. v. Davis*, 123 F. 396 (9th Cir. 1903).

Materialman who contracts direct with owner and has no privity of interest or contract with contractor, is an original contractor



and entitled to time given to such contractors within which to file his lien. *Colorado Iron Works v. Riekenberg*, 4 Idaho 262, 38 P. 651 (1894).

Time for filing lien cannot be extended by furnishing on a new contract or requesting additional articles and adding them to a completed account and statement of material furnished. *Valley Lbr. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 P. 765, 15 L.R.A. (n.s.) 299, 13 Ann. Cas. 63 (1907).

Materialman or laborer is given an absolute lien upon structure or improvement in which material was used or labor done if he files his claim of lien within time required by law, and payment by owner of the full contract price to contractor prior to date of filing of lien is no defense in action to foreclose such lien. *Weeter Lbr. Co. v. Fales*, 20 Idaho 255, 118 P. 289, Ann. Cas. 1913A, 403 (1911).

Ordinarily furnishing article or performing service, trivial in character, is not sufficient to extend time for claiming lien, or revive expired lien, where article or service are available after substantial completion of contract, and article is not expressly required by terms thereof. *H. W. Johns-Manville Co. v. Allen*, 37 Idaho 153, 215 P. 840 (1923); *Gem State Lbr. Co. v. Witty*, 37 Idaho 489, 217 P. 1027 (1923).

Lien of subcontractor must be filed within sixty days from date of completion of building or date of furnishing last item of material. *H. W. Johns-Manville Co. v. Allen*, 37 Idaho 153, 215 P. 840 (1923); *Gem State Lbr. Co. v. Witty*, 37 Idaho 489, 217 P. 1027 (1923).

Notice of claim of well driller's lien was held to be timely filed where notice was filed within 90 days of the sealing and capping of a completed well as the work of such sealing and capping was held not to be so minor or trivial as to be insufficient to extend the time within which to file a lien under this section. *Craig H. Hisaw, Inc. v. Bishop*, 95 Idaho 145, 504 P.2d 818 (1972).

Trivial work done or materials furnished after a construction contract has been substantially completed will not extend the time in which a lien claim can be filed under this section. *Mitchell v. Flandro*, 95 Idaho 228, 506 P.2d 455 (1973).

Where evidence established that construction contract was substantially completed on November 10, 1964 and trial court found inadequate proof that any material or substantial work was performed or supplies furnished after that date which would extend the time for filing a mechanic's lien, trial court correctly held that lien filed March 11, 1965 was not timely. *Mitchell v. Flandro*, 95 Idaho 228, 506 P.2d 455 (1973).

Since the sixty-day period provided by this section for the filing of mechanics' liens cannot be extended or revised by the furnishing of trivial labor or material once the contract

has been completed, a lien claimant must show that any additional materials or labor were actually used in constructing or repairing the structure and that they were necessary to complete construction according to terms of the contract. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

The time for filing a lien is not extended by performing a service, nor by furnishing an article, that is trivial in character, but remedying a defect in work or materials, at demand of a public inspector, will extend the time to file a lien. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In considering the timeliness of a lien filed by electrical subcontractor, the fact that property owner did not request final work performed at direction of the state electrical inspector was not dispositive, as the issue is not what the property owner requested, but whether the work in question was unnecessary or trivial. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

The time for filing a lien starts to run when the claimant performs his last substantial work or makes his last substantial delivery of materials. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In action involving a contract dispute which arose from a remodeling project that plaintiffs performed on residential home for defendants, lien filed August 20, 1992 was valid where there was substantial evidence that work performed between June 18 and 22nd was a substantial continuation of the work on the contract on which work was begun in March of 1992, where evidence showed that the work done between June 17 and June 22 was in furtherance of the existing contract and even though the work was not completed in 90 days as projects the parties had worked on in the past were generally completed, plaintiffs worked consistently from the time they undertook the project through June 22 and it was not a situation in which materials and services were rendered minimally in an attempt to prolong the filing date of the claim of lien. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

#### Timely Amending of Claim.

Since an original contractor must file a claim of lien no later than ninety days after the completion of the improvement, in the absence of statutory authorization, a defective claim of lien may not be amended after the statutory period for filing the claim has expired and although amendment of the complaint was permissible under the provisions of IRCP 15(b), such amendment could not remedy the fatal defect in the claim of lien based

on an improvement completed a year previously. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).

#### Verification of Notice.

The insertion of the legal description of the property involved by claimant's attorney, done on the written instructions of claimant, before filing for record but after the verification by claimant, did not violate the verification requirement of the statute where the claim of lien as filed for record complied with the statute. *Layrite Prods. Co. v. Lux*, 86 Idaho 477, 388 P.2d 105 (1964).

Where the certificate of the president of the laborer materialman company recited that an oath had been administered and stated that the claim was believed to be true and just, and the notary public's certificate attached thereto contained not merely a corporate acknowledgment but also a statement that the corporation's president "did subscribe and swear to" the lien claim before the notary, the certificates, taken together, constituted a verification and satisfied the requirement of this section. *Treasure Valley Plumbing & Heating,*

*Inc. v. Earth Resources Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984).

#### Work Must Be Performed.

During the time an employee held himself in readiness to perform labor, although he may recover therefor, he cannot file a lien within the time required by law where that is the last work performed, and since it is unlienable, it cannot be considered in determining the time within which a lien must be filed. *Nelson v. Boise Petro. Corp.*, 54 Idaho 179, 32 P.2d 782 (1934).

**Collateral References.** 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 188-244.

56 C.J.S., *Mechanics' Liens*, §§ 121-132.

Formal requisites of notice of intention to claim mechanics' lien. 158 A.L.R. 682.

Amount for which mechanic's lien may be obtained where contract has been terminated or abandoned by consent of parties or without fault on contractor's part. 51 A.L.R.2d 1009.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner. 52 A.L.R.3d 797.

**45-508. Claims against two buildings.** — In every case in which one (1) claim is filed against two (2) or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said buildings, mines, mining claims, or other improvement; otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated. [1893, p. 49, ch. 1, § 7; reen. 1899, p. 147, ch. 1, § 7; reen. C.L., § 5116; C.S., § 7347; I.C.A., § 44-508.]

**Cited in:** *Steltz v. Armory Co.*, 15 Idaho 551, 99 P. 98, 20 L.R.A. (n.s.) 872 (1908).

#### Filing Blanket Liens.

Where several claims and locations were owned and operated as one mine, as against parties so uniting them, they would be treated as single claim, and hence lien for services was not ineffective for failure to describe particular claim relative to which the services were rendered. *Idaho Mining & Milling Co. v. Davis*, 123 F. 396 (9th Cir. 1903).

Where company owns three mining claims and lien is filed against all of them without specifying amount due on each, such lien is postponed to other liens but is not void. *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903).

When a lien claimant fails to specify the amount claimed against each of several buildings, the claim is not thereby rendered void;

rather, the lien is postponed to other liens. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984).

It would exalt form over substance to hold that a notice of a materialman plumber's claim must describe with particularity each and every building, or other form of improvement where plumbing work was performed at a mining project, particularly where one party owns all the buildings and improvements at the mine site. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984).

**Collateral References.** Effect of a single mechanic's lien under an entire contract against two or more separate buildings on different lots in same ownership. 15 A.L.R.3d 73.



**45-509. Record of lien claims.** — The county recorder must record the claims mentioned in this chapter in a book kept by him for that purpose, which record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds or other instruments. [1893, p. 49, ch. 1, § 8; reen. 1899, p. 147, ch. 1, § 8; reen. R.C. & C.L., § 5117; C.S., § 7348; I.C.A., § 44-509.]

**Cross ref.** Fees of recorder, § 31-3205.  
Index of records, § 31-2404.

#### **Acknowledgement.**

Laborers and materialmen have the right to assert and obtain a lien which need not include an acknowledgement for it to be properly recorded against the property upon

which they have performed labor or for which they have furnished materials. A-J Corp. v. GVR Ltd., 107 Idaho 1101, 695 P.2d 1240 (1985).

**Collateral References.** Effect of a mechanic's lien on marketability of title. 57 A.L.R. 1253.

**45-510. Duration of lien.** — No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or unless a payment on account is made, or extension of credit given with expiration date thereof, and such payment or credit and expiration date, is indorsed on the record of the lien, then six (6) months after the date of such payment or expiration of extension. The lien of a final judgment obtained on any lien provided for in this chapter shall cease five (5) years from the date the judgment becomes final, but if such period of five (5) years has expired or will expire before September 1, 1947, the owner of such judgment lien shall have until September 1, 1947, within which to levy execution under such judgment. [1893, p. 49, ch. 1, § 9; reen. 1899, p. 147, ch. 1, § 9; reen. R.C. & C.L., § 5118; C.S., § 7349, I.C.A., § 44-510; am. 1947, ch. 125, § 1, p. 292.]

**Cross ref.** See notes, § 45-505 under heading "Foreclosure of Lien." Brown v. Hawkins (1945), 66 Idaho 351, 158 P.2d 840.

**Cited in:** Jones v. Lickley, 453 F. Supp. 44 (D. Idaho 1978); Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc., 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984).

#### **ANALYSIS**

Action timely.  
Attorney fees.  
Computation of time period.  
Effect of running of period.  
Effect on lienholders not joined.  
Extension of time.  
Lis pendens.  
Perfection of interest.  
Right as affected by limitation.  
Running of period of limitation.

#### **Action Timely.**

To restrict time within which materialman must perfect its lien to one day less than six

months would not be in keeping with the policy of liberal construction embodied in § 73-102. Accordingly, where materialman filed lien on property and second materialman filed foreclosure action in which first materialman was named as a defendant, and where the last day of the six-month limitation period fell on a Saturday, the time period was carried over to the next business day, pursuant to I.R.C.P., Rule 6(a), and first materialman's answer, counterclaim and cross-claim, which were filed on the following Monday, were timely. Cather v. Kelso, 103 Idaho 684, 652 P.2d 188 (1982).

#### **Attorney Fees.**

Plaintiff was entitled to recover interest from date the balance of debt became due, but not attorney fees, where the plaintiff was not entitled to foreclosure due to failure to make wife a party to the proceeding within six month period. Willes v. Palmer, 78 Idaho 104, 298 P.2d 972 (1956).

### Computation of Time Period.

Based upon § 1-212, which recognizes the power of the Supreme Court to make procedural rules, and I.R.C.P., Rule 6(a), which establishes the method for computing time periods, it is clear that the legislature and the Supreme Court were attempting to compensate for the closure of the clerk's office on weekends and holidays and, in this regard, the time limitation contained in this section is analogous to a statute of limitation; when one considers the purpose of the rule and the statute the only interpretation is that I.R.C.P., Rule 6(a) is applicable to this section. This interpretation permits the court clerk's office to be closed on Saturdays, Sundays and legal holidays without shortening the time established by the legislature within which the action must be filed; to hold otherwise, for all practical purposes, would result in a shortening of the statutory limitation period. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

### Effect of Running of Period.

Where consideration of note was removal of lien on real property within one year, action on note is premature before expiration of year, even though lien was removed by operation of law, since it still remained a cloud on the title. *Roberts v. Harrill*, 42 Idaho 555, 247 P. 451 (1926).

### Effect on Lienholders Not Joined.

Mortgagee not made party to foreclosure suit is not bound by the judgment nor is the lien after the expiration of the statutory period of any effect as against mortgagee's interest. *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942 (D. Idaho 1913).

Statute does not prescribe in terms who shall be made parties to suit, but it necessarily means suit must be brought against all whose rights, estates or interests are claimed to be adverse and subordinate; otherwise they are not affected by it, and as to them lien ceases to be effective after expiration of six months' limitation period. *Continental & Com. Trust & Sav. Bank v. Pacific Coast Pipe Co.*, 222 F. 781 (9th Cir. 1915); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F. 517 (9th Cir. 1915).

Husband's half interest in property could not be foreclosed upon by holder of mechanic's lien though suit was filed within six month period against the husband where the wife was not made a party within the six month period. *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956).

Lien against wife was lost though suit was filed against husband within six months period where the wife was not made a party to the proceeding until over a year after the claim was filed. *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956).

### Extension of Time.

Time within which action to enforce lien can be commenced after lien has been filed cannot be extended, as against another encumbrancer, by agreement between lienor and owner. *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

Agreement to extend time for foreclosure of mechanic's lien is not a giving of credit. *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

A payment on account made and indorsed on the record of the lien within six months after the claim has been filed does, within the meaning of the statute, extend the duration of a lien covered by said statute for a period of six months after such payment. However, additional or successive payments on account, even though indorsed on the record of the lien, no matter when made, will not extend the duration of the lien beyond the six-month period following the first payment. *Palmer v. Bradford*, 86 Idaho 395, 388 P.2d 96 (1963).

### Lis Pendens.

It is necessary to file a lis pendens in connection with an action to foreclose a mechanic's lien in order to give constructive notice of the foreclosure of the lien beyond the six-month period required for commencing such action. *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank*, 117 Idaho 29, 784 P.2d 885 (1989).

### Perfection of Interest.

The commencement of proceedings to enforce a statutory materialmen's lien within the six-month period of this section is not an element of "perfection" as required to perfect an interest in property under the Bankruptcy Code, but is merely a time limitation on enforcement which is tolled by 11 U.S.C. § 108(c) of the Bankruptcy Code. *First Am. Title Co. v. Design Bldrs., Inc.*, 18 Bankr. 392 (Bankr. D. Idaho 1981).

### Right as Affected by Limitation.

Time limitation prescribed by this section makes remedy a part of and conditions right created. Unless suit is brought within time limited, lien itself ceases to exist. *Continental & Com. Trust & Sav. Bank v. Pacific Coast Pipe Co.*, 222 F. 781 (9th Cir. 1915).

This section and IRCP 3(a) and 4(a) provide the only limitations in foreclosure of mechanics' liens, which are, first, that proceedings must be commenced for foreclosure of liens within six months after claim of lien is filed, and, second, that summons may be issued at any time within one year after the commencement of action. *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911).

Lien does not continue unless proceedings are commenced in proper court against person or persons against whose interest lien is



asserted, within time limited by statute. *Western Loan & Bldg. Co. v. Gem State Lbr. Co.*, 32 Idaho 497, 185 P. 554 (1919); *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

#### **Running of Period of Limitation.**

Six months' period of limitation begins to run immediately upon filing lien, and any disability which arrests running of statute

must exist at time right of action accrues. Statute having once attached, period will continue to run and is not suspended by any subsequent disability. *Boise Payette Lbr. Co. v. Weaver*, 40 Idaho 516, 234 P. 150 (1925).

**Collateral References.** 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 251-255.

56 C.J.S., *Mechanics' Liens*, §§ 204-210.

**45-511. Recovery by contractor — Deduction of debts to subcontractors.** — The original or subcontractor shall be entitled to recover, upon the claim filed by him, only such amount as may be due to him according to the terms of his contract, and, if applicable, such other amounts as may be found due to the lien claimant by the court pursuant to section 45-522, Idaho Code, after deducting all claims of other parties for work done and materials furnished to him as aforesaid, of which claim of lien shall have been filed as required by this chapter, and in all cases where a claim shall be filed under this chapter for work done or materials furnished to any subcontractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the person indebted to the contractor may withhold from such contractor the amount of money for which claim is filed; and in case of judgment upon the lien, the person indebted in the contract shall be entitled to deduct from any amount due or to become due by him to such contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due from him to such contractor, if the person indebted in the contract shall have settled with such contractor in full, he shall be entitled to recover back from such contractor any amount so paid by him in excess of the contract price, and for which such contractor was originally the party liable. [1893, p. 49, ch. 1, § 10; reen. 1899, p. 147, ch. 1, § 10; reen. R.C. & C.L., § 5119; C.S., § 7350; I.C.A., § 44-511; am. 1993, ch. 378, § 2, p. 1386.]

**Compiler's notes.** Sections 1 and 3 of S.L. 1993, ch. 378 are compiled as §§ 45-507 and 45-518, respectively.

**Cited in:** *Boise-Payette Lumber Co. v. Challis Independent Sch. Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928).

#### **ANALYSIS**

**Contractor's lien.**

Duty to defend.

Lien right for material exists, without attempt to collect from contractor.

Materialman as original contractor.

#### **Contractor's Lien.**

Where owners of railroad right of way authorized contractors to put crew of men to work upon such right of way, and agree to pay such contractors amount actually expended in labor and material, plus twenty per cent, and a certain sum for use of tools, and contractors present bill to railway company which is audited and approved by company, it becomes

an account stated, to secure and support which a lien may be filed. *Naylor v. Lewiston & S.E. Elec. Ry.*, 14 Idaho 789, 96 P. 573 (1908).

Contractor is entitled to his lien not only for his own labor but for labor of those under him, and even though his workmen have taken out liens, effect is only to diminish contractor's lien pro tanto. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Corporation cannot have laborer's lien. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

#### **Duty to Defend.**

The district court did not err in ruling, at the summary judgment stage, that contractor rather than building owner had the duty to defend against the claims of the subcontractors. Although this section did not explicitly place the duty upon the contractor, that intent was implicit in the statutory scheme. *Bouten Constr. Co. v. M & L Land Co.*, 125

Idaho 957, 877 P.2d 928 (Ct. App. 1994).

**Lien Right for Material Exists, Without Attempt to Collect From Contractor.**

A lumber company which furnished materials to be used in improving owners' dwelling could enforce lien against the building without first seeking payment for the materials from the original contractor. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

**Materialman as Original Contractor.**

Materialman who contracts directly with owner and has no privity of interest and no contract with contractor for construction is an original contractor. *Colorado Iron Works v. Riekenberg*, 4 Idaho 262, 38 P. 651 (1894).

**Collateral References.** 56 C.J.S., *Mechanics' Liens*, §§ 105-120.

Contract between owner and principal contractor against liens as depriving subcontractors of right to liens. 13 A.L.R. 1065; 102 A.L.R. 356; 76 A.L.R.2d 1087.

Effect of bankruptcy of contractor or subcontractor upon the mechanics' liens of their subcontractors, laborers, and materialmen. 98 A.L.R. 323.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner. 78 A.L.R.2d 1165.

Right of subcontractor who has dealt only with primary contractor to recover against property owner in quasi contract. 62 A.L.R.3d 288.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman. 75 A.L.R.3d 505.

**45-512. Judgment to declare priority.** — In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order:

1. All laborers, other than contractors or subcontractors.
2. All materialmen including persons furnishing, renting or leasing equipment, materials or fixtures as defined in section 28-12-309, Idaho Code, other than contractors or subcontractors.
3. Subcontractors.
4. The original contractor.
5. All professional engineers and licensed surveyors.

And in case the proceeds of sale under this chapter shall be insufficient to pay all lienholders under it:

1. The liens of all laborers, other than the original contractor and subcontractor, shall first be paid in full, or pro rata if the proceeds be insufficient to pay them in full.

2. The lien of materialmen including persons furnishing, renting or leasing equipment, materials or fixtures as defined in section 28-12-309, Idaho Code, other than the original contractor or subcontractor, shall be paid in full, or pro rata if the proceeds be insufficient to pay them in full.

3. Out of the remainder, if any, the subcontractors shall be paid in full, or pro rata if the remainder be insufficient to pay them in full, and the remainder, if any, shall be paid pro rata to the original contractor and the professional engineers and licensed surveyors; and each claimant shall be entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court upon demand, at the return of the sheriff or other officer making the sale, showing such balance due. [1893, p. 49, ch. 1, § 11; reen. 1899, p. 147, ch. 1, § 11; reen. R.C. & C.L., § 5120; C.S., § 7351; I.C.A., § 44-512; am. 1971, ch. 91, § 6, p. 196; am. 2001, ch. 152, § 6, p. 550.]



**Compiler's notes.** Sections 5 and 7 of S.L. 2001, ch. 152, are compiled as §§ 45-507 and 45-515, respectively.

**Cross ref.** See notes, § 45-505. *Brown v. Hawkins* (1945), 66 Idaho 351, 158 P.2d 840.

**Cited in:** *Ultrawall, Inc. v. Washington Mut. Bank*, 135 Idaho 832, 25 P.3d 855 (2001).

#### ANALYSIS

Contractors and subcontractors.

Deficiency judgment.

Determination of priorities.

Nature of judgment.

Priority of assignee.

Subcontractor's lien.

#### Contractors and Subcontractors.

Materialman who contracts directly with owner and his no privity of interest and no contract with contractor for construction is an original contractor. *Colorado Iron Works v. Riekenberg*, 4 Idaho 262, 38 P. 651 (1894).

Corporation furnishing labor and material in installing plumbing and heating, contracting directly with original contractor for building, is entitled to lien as subcontractor only and not as materialman. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Corporation is not entitled to labor lien. *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

#### Deficiency Judgment.

A subcontractor may obtain a deficiency judgment against the landowners. *Weber v. Eastern Idaho Packing Corp.*, 94 Idaho 694, 496 P.2d 693 (1972).

In an action to foreclose a mechanic's lien brought by a subcontractor who furnished labor and materials in connection with the installation of a heating system in a dwelling, the subcontractor was not entitled to a personal judgment against the homeowner for any deficiency which might remain after the foreclosure sale, where the homeowner was not in a direct contractual relationship with the subcontractor. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

#### Determination of Priorities.

This section applies to cases in which there are no intervening mortgage liens; where mortgage liens are involved, time or date when building was commenced or laborer began to work, or materialman commenced to furnish material, must be taken into consid-

eration in determining priority of such liens over mortgage liens. *Pacific States Sav. Loan & Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905).

Using this section and § 45-506 as the mechanism to set the priority of plaintiff's mechanics lien as against the mortgage liens of the Trusts, the district court's review of the mortgage lien on the property held by the Trusts was proper. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 992 P.2d 751 (1999).

#### Nature of Judgment.

Judgment and decree foreclosing mechanic's or laborer's lien and directing sale of property on which lien is claimed is not a money judgment within § 13-204 (repealed), providing for supersedeas bond in double amount of judgment. *Naylor & Norlin v. Lewiston & S.E. Elec. Ry. Co.*, 14 Idaho 722, 95 P. 827 (1908).

Deficiency judgment is in effect provided for in this section by provision for execution for balance that may be due. *Blake v. Crystalline Lime Co.*, 37 Idaho 637, 221 P. 1100 (1923).

#### Priority of Assignee.

In lien foreclosure where all parties claiming same were joined in same action and, after judgment, two claimants assigned their judgments to another claimant and the heirs of deceased owner assigned their interest to the same assignee, the legal title to the property was then merged in assignee unless such merger would cause injustice to a junior lien. *Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

#### Subcontractor's Lien.

The uncollected balance of a subcontractor's lien which does not duplicate part of the contractor's lien is treated as a personal judgment, and where the requirements for personal jurisdiction are met, the subcontractor's lien is an effective personal judgment against the landowners. *Weber v. Eastern Idaho Packing Corp.*, 94 Idaho 694, 496 P.2d 693 (1972).

**Collateral References.** 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 445-455.

56 C.J.S., *Mechanics' Liens*, §§ 220-245.

Priority between lien for repairs and right of a seller under a conditional sales contract. 36 A.L.R.2d 198.

Priority between artisan's lien and a chattel mortgage. 36 A.L.R.2d 229.

**45-513. Joinder of actions — Filing fees as costs — Attorney's fees.** — Any number of persons claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorney's

fees. [1893, p. 49, ch. 1, § 12; reen. 1899, p. 147, ch. 1, § 12; reen. R.C. & C.L., § 5121; C.S., § 7352; I.C.A., § 44-513.]

**Cross ref.** See notes, § 45-505. *Brown v. Hawkins* (1945), 66 Idaho 351, 158 P.2d 840.

**Cited in:** *Pacific States Sav., Loan & Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905); *Boise-Payette Lumber Co. v. Challis Independent Sch. Dist.* No. 1, 46 Idaho 403, 268 P. 26 (1928); *Scogings v. Andreason*, 91 Idaho 176, 418 P.2d 273 (1966); *Darrar v. Chicago, M., St. P. & Pac. R.R.*, 94 Idaho 772, 497 P.2d 1399 (1972); *Hafer v. Horn*, 95 Idaho 621, 515 P.2d 1013 (1973); *Del Milam & Sons v. Bailey*, 107 Idaho 587, 691 P.2d 1202 (1984); *LaGrand Steel Prods. Co. v. A.S.C. Constructors, Inc.*, 108 Idaho 817, 702 P.2d 855 (Ct. App. 1985); *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997); *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 40 P.3d 96 (2002).

#### ANALYSIS

Application of I.R.C.P. 54(e).  
Attorney's fees.  
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Parties.

#### Application of I.R.C.P. 54(e).

To the extent that I.R.C.P. 54(e), which requires the finding of a prevailing party within the discretion of the district court, is inconsistent with this section, which provides for a mandatory award of attorney fees as part of the enforcement of a lien, the rule has no application and does not modify the statute. *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

#### Attorney's Fees.

Attorney's fees are allowed in the foreclosure of mechanics' and laborers' liens. *Robertson v. Moore*, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, *Dover Lumber Co. v. Case*, 31 Idaho 176, 170 P. 108 (1918).

Attorney's fees are not a part of the costs, and therefore are recoverable, even though the amount of judgment is less than \$100. *Shaw v. Johnston*, 17 Idaho 676, 107 P. 399 (1910).

Attorney's fees are an incident of the judgment and defendant is liable therefor. *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915).

The omission of a part of the law adopted from California, to provide for attorney's fees for work in the Supreme Court, is sufficient to show that it was the legislative intent not to adopt that part of the California law. *Hendrix v. Gold Ridge Mines, Inc.*, 54 Idaho 326, 54 P.2d 254 (1936).

Where plaintiff filed suit to recover wages before wages were due but they were due at time of appeal the judgment in favor of plaintiff would not be reversed but that part of the judgment allowing attorney fees would be stricken. *Schlueter v. Nelson*, 74 Idaho 396, 263 P.2d 386 (1953).

Plaintiff was entitled to attorney fee in suit to foreclose mechanic's lien although he did not establish full amount of claim. *Guyman v. Anderson* (1954), 75 Idaho 294, 271 P.2d 1020.

This section only authorizes district court to allow attorney fees for foreclosing liens. *Ivie v. Peck*, 94 Idaho 625, 495 P.2d 1110 (1972).

This statute does not permit recovery of attorney fees on appeal by mechanic's lien claimants. *Weber v. Eastern Idaho Packing Corp.*, 94 Idaho 694, 496 P.2d 693 (1972); overruled on other grounds, *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

In an action to foreclose a mechanic's lien brought by a subcontractor who furnished labor and materials in connection with the installation of a heating system in a dwelling, subcontractor's attorney was not entitled to be awarded a fee for the time spent in preparing the mechanic's lien. *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975).

Where a contractor stipulated to release its materialmen's lien upon condition that a sufficient sum of money would be held in a special account to pay any balance found to be due the contractor, the stipulation did not displace the contractor's right to an attorney fee on his successful cross-claim against the property owners to foreclose his materialmen's lien, since the cross-claim, seeking to recover from the special account fund, was the functional equivalent of an action to foreclose the lien. *J.E.T. Dev. v. Dorsey Constr. Co.*, 102 Idaho 863, 642 P.2d 954 (Ct. App. 1982).

The fact that the amount determined to be due a contractor under a construction contract was less than the amount claimed by the contractor in its notice of a materialmen's lien did not bar recovery by the contractor of a statutory attorney fee under this section because a reasonable attorney fee was an incident of foreclosure of the lien. *J.E.T. Dev. v. Dorsey Constr. Co.*, 102 Idaho 863, 642 P.2d 954 (Ct. App. 1982).

Both a general contractor and the landowner are responsible for the attorney fees incurred in legal proceedings to collect the claim of a materialmen's lien. *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982).

Where the owners of the property retained



the money due the principal contractor and, apparently without cause or right, contested the materialmen's garnishment as well as foreclosure proceedings on every point, and litigated the case to the end, thereby delaying the materialmen in recovering on the partial summary judgments they were entitled to, and putting them to unnecessary legal expense, it was proper to allow the materialmen attorney fees payable out of the proceeds of the foreclosure sale of the owners' real property. *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982).

This section has been interpreted by the Idaho Supreme Court to provide no basis for a successful lien claimant to receive attorney fees on appeal. However, these decisions do not insulate lien foreclosure cases from discretionary awards of attorney fees on appeal under § 12-121. Therefore, where the appellate court has left with the abiding belief that an appeal was brought without foundation, it appropriately awarded attorney fees on appeal to the appellee. *W.F. Constr. Co. v. Kalik*, 103 Idaho 713, 652 P.2d 661 (Ct. App. 1982).

This section does not authorize an award of attorney fees on appeal; an award may be made under § 12-121, but only if the appeal was brought or defended frivolously, unreasonably or without foundation. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109 (Ct. App. 1985).

This section has been construed to exclude appeals, and by parity of reasoning, general contractor's surety was denied attorney's fees on appeal pursuant to § 54-1929. *Einco Div. v. United Pac. Ins. Co.*, 109 Idaho 762, 710 P.2d 672 (Ct. App. 1985).

Attorney fees are not recoverable on appeal under this section, however an award could be made under § 12-121, but only if we found that defendant's appeal was brought or pursued "frivolously, unreasonably or without foundation." *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988).

The trial court is free to consider all factors it deems as having a bearing on attorney fees in its determination of what is reasonable. *Barber v. Honorof*, 116 Idaho 767, 780 P.2d 89 (1989).

When a party successfully forecloses on a lien filed pursuant to § 45-507, that party is entitled to an award of the costs associated with the foreclosure pursuant to this section. *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Upon the successful entry of a judgment of foreclosure of a lien claimed under § 45-507, an award of attorney fees and costs is mandatory. The amount of the award, however, is still a matter of discretion for the district court. In determining the amount, the district court is free to consider the factors of I.R.C.P.

54(e)(3) as well as those considerations which are part of a prevailing party analysis under I.R.C.P. 54(d)(1)(B). *Olsen v. Rowe*, 125 Idaho 686, 873 P.2d 1340 (Ct. App. 1994).

Where plaintiffs who claimed liens were not successful in their claims, and where neither out-of-state bond statutes nor the theory of unjust enrichment provided relief to any of them, awards of attorney fees to the plaintiffs were not appropriate. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

Since the costs of filing and recording, as well as the attorney fees, are incidental to the foreclosure of a lien pursuant to this section, the award of attorney fees as part of the enforcement of the lien was a mandatory award. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 41 P.3d 242 (2001).

### **Constitutionality.**

Provision of this section which authorizes recovery of attorney's fee is not class legislation and does not violate Const., Art. 1, § 18, providing that justice shall be administered without sale. *Thompson v. Wise Boy Mining & Milling Co.*, 9 Idaho 363, 74 P. 958 (1903).

This section does not violate the guarantee of equal protection of the law by allowing attorney fees to the lienor but not allowing them to the property owner successfully resisting lien foreclosure nor by singling out and penalizing a single class of debtors. *Harrington v. McCarthy*, 91 Idaho 370, 420 P.2d 790 (1966).

A contractor was entitled to reasonable attorney fees where it was held that he could obtain a lien on property for the entire amount due, including the amount owing for work done on an easement road attached to the property. *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (Ct. App. 1999).

### **Legislative Intent.**

In light of the clear legislative intent to restrict the recovery of attorney fees in a lien foreclosure to those incurred in district court, the appellate court declined to award the prevailing party attorney fees for his prosecution of a cross-appeal. *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (Ct. App. 1999).

### **Parties.**

Though parties are joined under this section, if actions are individual, parties will be recognized as separate in their respective rights. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho 5, 93 P. 789 (1908); *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911); *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204.

In an action to foreclose a mechanic's lien, the court properly joined all parties claiming liens against the same property. *Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

In lien foreclosure where all parties claiming same were joined in same action and, after judgment, two claimants assigned their judgments to another claimant and the heirs of deceased owner assigned their interest to the same assignee, the legal title to the property was then merged in assignee unless such merger would cause injustice to a junior lien.

*Brown v. Hawkins*, 66 Idaho 351, 158 P.2d 840 (1945).

**Collateral References.** 53 Am. Jur. 2d, *Mechanics' Liens*, §§ 191-217, 234.

56 C.J.S., *Mechanics' Liens*, §§ 432-436.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases. 10 A.L.R.5th 448.

**45-514. Exemption of materials from execution.** — Whenever materials shall have been furnished for use in the construction, alteration or repair of any buildings, or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as, in good faith, the same are being applied to the construction, alteration or repair of such building, mining claim or other improvement. [1893, p. 49, ch. 1, § 13; reen. 1899, p. 147, ch. 1, § 13; reen. R.C. & C.L., § 5122; C.S., § 7353; I.C.A., § 44-514.]

#### ANALYSIS

Lien right for materials exists without attempt to collect from contractor.

#### **Lien Right for Materials Exists Without Attempt to Collect From Contractor.**

A lumber company which furnished materials to be used in improving owners' dwelling could enforce lien against the building without first seeking payment for the materials from the original contractor. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

**Collateral References.** 56 C.J.S., *Mechanic's Liens*, §§ 34-48.

Preparatory or fabricating work done on materials intended for use and used in particular building or structure, right to mechanic's lien as for "labor" or "work," in case of. 25 A.L.R.2d 1370.

Delivery of material to building site as sustaining mechanic's lien — Modern cases. 32 A.L.R.4th 1130.

**45-515. Action to recover debt.** — Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, equipment, materials or fixtures rented or leased or materials furnished, to maintain a personal action to recover such debt against the person liable therefor. [1893, p. 49, ch. 1, § 14; reen. 1899, p. 147, ch. 1, § 14; reen. R.C. & C.L., § 5123; C.S., § 7354; I.C.A., § 44-515; am. 2001, ch. 152, § 7, p. 550.]

**Compiler's notes.** Section 6 of S.L. 2001, ch. 152, is compiled as § 45-512.

**Cross ref.** See notes, § 45-505. *Brown v. Hawkins* (1945), 66 Idaho 351, 158 P.2d 840.

#### ANALYSIS

Attorney's fees.

Contract right not invalidated.

Enforcement of materialman's lien.

Nature of judgment.

Right to other remedy.

#### **Attorney's Fees.**

This section allows the materialman lien claimant to collect the debt both through foreclosure of the lien and a personal action against the contractor. Accordingly, the fact

that the subcontractor materialmen had not yet reduced to judgment their claims for attorney fees against the principal contractor did not prevent their obtaining a judgment for those fees against the owners of the real property. *Acoustic Specialties, Inc. v. Wright*, 103 Idaho 595, 651 P.2d 529 (1982).

#### **Contract Right Not Invalidated.**

Although plaintiff did not succeed in preserving a lien on the defendants' interest in the real property and was not entitled to foreclosure, this did not invalidate his personal judgment against defendants for monies due on the underlying contract, less set-offs. *Ross v. Olson*, 95 Idaho 915, 523 P.2d 518 (1974).



**Enforcement of Materialman's Lien.**

A lumber company furnishing materials to improve owners' dwelling can enforce a materialman's lien against the dwelling, without first seeking payment from the original contractor. *Idaho Lbr. & Hdw. Co. v. DiGiacomo*, 61 Idaho 383, 102 P.2d 637 (1940).

**Nature of Judgment.**

Judgment foreclosing mechanic's lien was not a money judgment within former § 13-204 (repealed 1977). *Naylor & Norlin v. Lewiston & S.E. Elec. Ry. Co.*, 14 Idaho 722, 95 P. 827 (1908).

**Right to Other Remedy.**

This section contemplates that when one

erroneously asserts right to mechanic's lien such action shall not be construed to impair or affect his right to recover in indebitatus assumpsit for work done or material furnished. *Lus v. Pecararo*, 41 Idaho 425, 238 P. 1021 (1925). This right is recognized in *Boise Lumber Co. v. Independent School Dist.*, 36 Idaho 778, 214 P. 143 (1923), where it was held that, by reason of valid tender before filing of lien, right to lien was extinguished, but plaintiff was allowed right to recover material furnished.

**Collateral References.** Modern view as to validity of statute permitting sale of vehicle without hearing. 64 A.L.R.3d 814.

**45-516. Rules of practice and appeals.** — Except as otherwise provided in this chapter, the provisions of this code relating to civil actions, new trials and appeals are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter: provided, that the district courts shall have jurisdiction of all actions brought under this chapter. [1893, p. 49, ch. 1, § 15; reen. 1899, p. 147, ch. 1, § 15; reen. R.C. & C.L., § 5124; C.S., § 7355; I.C.A., § 44-516.]

**Cross ref.** Appeals, §§ 13-201 — 13-203.

Civil action, I.R.C.P., Rule 2.

New trials, I.R.C.P., Rule 59(a).

**Cited in:** *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942 (D. Idaho 1913); *Shaw v. Martin*, 20 Idaho 168, 117 P. 853 (1911); *Dawson v. Eldredge*, 89 Idaho 402, 405 P.2d 754 (1965).

**ANALYSIS**

Attorney fees.

Lis pendens.

Nature of action.

Sufficiency of complaint.

**Attorney Fees.**

Plaintiff was entitled to recover interest from date the balance of debt became due, but not attorney fees, where the plaintiff was not entitled to foreclosure due to failure to make wife a party to the proceeding within six month period. *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956).

**Lis Pendens.**

It is necessary to file a lis pendens in connection with an action to foreclose a mechanic's lien in order to give constructive

notice of the foreclosure of the lien beyond the six-month period required for commencing such action. *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank*, 117 Idaho 29, 784 P.2d 885 (1989).

**Nature of Action.**

Action to foreclose mechanic's lien is equitable in its nature and court is not bound to submit any issue of fact to the jury; if it does so, it may disregard verdict and findings and may enter a decree according to its own view of evidence in the case. *Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U.S. 509, 10 S. Ct. 177, 33 L. Ed. 433 (1889); *Jensen v. Bumgarner*, 25 Idaho 355, 137 P. 529 (1913).

**Sufficiency of Complaint.**

Complaint for foreclosure of laborer's lien that sufficiently describes property, fixes time and manner of labor, amount due, and alleges that lien was filed within statutory time, together with the necessary requirements in ordinary suits in equity, is sufficient. *Robertson v. Moore*, 10 Idaho 115, 77 P. 218 (1904), overruled on other grounds, *Dover Lumber Co. v. Case*, 31 Idaho 176, 170 P. 108 (1918).

**45-517. Lien for workmen's compensation security.** — The term "labor" as used in this title, shall include the cost of workmen's compensation and occupational disease compensation security required by the provisions of [sections 72-301 to 72-304] and amendments thereto, payment for

which security has not been made. [I. C., § 45-517, as added by 1951, ch. 234, § 1, p. 471.]

**Compiler's notes.** The bracketed material was substituted for "section 72-801 and section 72-1203" by the compiler since the subject matter of these sections has been redesignated by S.L. 1971, ch. 124.

ANALYSIS

Insurance.  
Open account defense.

**Insurance.**  
While the legislature has provided protection for the recovery of worker's compensation

security in the mechanic's lien laws, it has not so provided for any other form of insurance. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

**Open Account Defense.**  
The open account defense applies to those claimants attempting to recover under the state's mechanic's lien statutes, even those parties who assert a lien in the worker's compensation context. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999).

**45-518. Release of lien on real property by posting surety bond — Manner.** — A mechanic's lien of record upon real property may be released upon the posting of a surety bond in the manner provided in sections 45-519 through 45-524, Idaho Code. [I.C., § 45-518, as added by 1993, ch. 378, § 3, p. 1386.]

**Compiler's notes.** Section 2 of S.L. 1993, ch. 378 is compiled as § 45-511.

**45-519. Release of lien on real property by posting surety bond — Form of bond.** — The debtor of the lien claimant or a party in interest in the premises subject to the lien must obtain a surety bond executed by the debtor of the lien claimant or a party in interest in the premises subject to the lien, as principal, and executed by a corporation authorized to transact surety business in this state, as surety, in substantially the following form:

(Title of court and cause, if action has been commenced)

WHEREAS, ..... (name of owner, contractor, or other person disputing the lien) desires to give a bond for releasing the following described real property from that certain claim of mechanic's lien in the sum of \$......, recorded ....., ....., in the office of the recorder in ..... (name of county where the real property is situated):

(legal description)

NOW, THEREFORE, the undersigned principal and surety do hereby obligate themselves to ....., (name of claimant) the claimant named in the mechanic's lien, under the conditions prescribed by sections 45-518 through 45-524, Idaho Code, inclusive, in the sum of \$...... (1-½ x claim), from which sum they will pay the claimant such amount as a court of competent jurisdiction may adjudge to have been secured by his lien, with interest, costs and attorney's fees.

IN WITNESS WHEREOF, the principal and surety have executed this bond at ....., Idaho, on the .... day of ....., ....

.....  
(Signature of Principal)  
(SURETY CORPORATION)

BY.....



(Its Attorney in Fact)

State of Idaho )  
 ) ss.  
County of .... )

On ....., .., before me, the undersigned, a notary public of this county and state, personally appeared ..... who acknowledged that he executed the foregoing instrument as principal for the purposes therein mentioned and also personally appeared ..... known (or satisfactorily proved) to me to be the attorney in fact of the corporation that executed the foregoing instrument and known to me to be the person who executed that instrument on behalf of the corporation therein named, and he acknowledged to me that that corporation executed the foregoing instrument.

.....  
(Notary Public in and for the  
County and State)

[I.C., § 45-519, as added by 1993, ch. 378, § 4, p. 1386; am. 2002, ch. 32, § 18, p. 46.]

**Compiler's notes.** Sections 17 and 19 of S.L. 2002, ch. 32, are compiled as §§ 45-407 and 47-606, respectively. **Sec. to sec. ref.** This section is referred to in § 45-523.

**45-520. Release of lien on real property by posting surety bond —**  
**Petition for release — Service of copy of petition. —** (1) A petition for the release of a mechanic's lien by posting a surety bond must be filed in the district court of the county wherein the property is located and shall set forth:

- (a) The title of the cause, thus: "In the matter of the petition of \_\_\_\_\_ (name of petitioner) for release of mechanic's lien of \_\_\_\_\_ (name of mechanic's lien claimant) upon posting surety bond."
  - (b) An allegation of the purchase of and payment of the premium for the bond, and the dates of purchase and payment.
  - (c) An allegation incorporating by reference a true copy of the bond, which copy must be attached to the petition.
  - (d) The name or names of the owner or reputed owners of the land subject to the lien.
  - (e) A description of the real property subject to the lien, and the instrument number of the lien as given by the recorder's office.
  - (f) A prayer for an order releasing the lien.
- (2) The petitioner shall obtain an order from the district court setting forth the time and date of the hearing on the petition, which time and date must be at least five (5) days after the date of the order and not more than ten (10) days after the date of the order.
- (3) A copy of the petition and a copy of the order must be served on the lien claimant at least two (2) days before the date set for the hearing and served in the manner provided by law for service of summons. [I.C., § 45-520, as added by 1993, ch. 378, § 5, p. 1386.]

Sec. to sec. ref. This section is referred to in § 45-524.

**45-521. Release of lien on real property by posting surety bond — Hearing on petition — Contents and effect of order releasing lien. —**

(1) Upon the hearing, the court shall enter its order releasing the mechanic's lien upon the petitioner's filing in open court the original bond, and introducing into evidence a receipt for payment of the premium.

(2) The entry of the order by the court must refer to the property which is the subject of the lien and the lien itself, by instrument number, and must recite that the lien is released of record for all purposes to the same extent as if released of record by the lienor.

(3) Upon entry of the order, the lien is released of record in its entirety and for all purposes and the real property, the subject of the lien, is released from the encumbrances of the lien.

(4) There is no appeal from the entry of an order pursuant to the provisions of this section and upon entry the order is final for all purposes. [I.C., § 45-521, as added by 1993, ch. 378, § 6, p. 1386.]

**45-522. Release of lien on real property by posting surety bond — Action against debtor and surety — Preferential settings. —** (1) The lien claimant is entitled to bring an action against the lien claimant's debtor and to join therein the surety on the bond. The rights of the lien claimant include and the court may award to him in that action:

(a) The amount found due to the lien claimant by the court;

(b) The cost of preparing and filing the lien claim, including attorney's fees, if any;

(c) The costs of the proceedings;

(d) Attorney's fees for representation of the lien claimant in the proceedings; and

(e) Interest at the rate of seven percent (7%) per annum on the amount found due to the lien claimant and from the date found by the court that the sum was due and payable.

(2) Proceedings under subsection (1) of this section are entitled to priority of hearing second only to criminal hearings. The plaintiff in the action may serve upon the adverse party a "demand for thirty (30) day setting" in the proper form, and file the demand with the clerk of the court. Upon filing, the clerk of the court shall, before Friday next, vacate a case or cases as necessary and set the lien claimant's case for hearing, on a day or days certain, to be heard within thirty (30) days of the filing of the "demand for thirty (30) day setting." Only one (1) such preferential setting need be given by the court, unless the hearing date is vacated without stipulation of counsel for the plaintiff in writing. If the hearing date is vacated without that stipulation, upon service and filing of a "demand for thirty (30) day setting," a new preferential setting must be given. [I.C., § 45-522, as added by 1993, ch. 378, § 7, p. 1386.]

Sec. to sec. ref. This section is referred to in § 45-511.



**45-523. Release of lien on real property by posting surety bond — Motion to enforce liability of surety.** — (1) By entering into a bond given pursuant to section 45-519, Idaho Code, the surety submits himself to the jurisdiction of the court in which the bond is filed in the proceeding for release of the lien, and the surety irrevocably appoints the clerk of that court as its agent upon whom any papers affecting its liability on the bond may be served. Its liability may be enforced on motion without the necessity of an independent action. The motion and such notice of motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the surety if his address is known.

(2) The motion described in subsection (1) of this section must not be instituted until the lapse of thirty (30) days following the giving of notice of entry of judgment in the action against the lien claimant's debtor, if no notice of appeal from the judgment is filed, nor may the motion be instituted until the lapse of thirty (30) days following the filing of the remittitur from the court of appeals or the supreme court, if an appeal has been taken from the judgment. [I.C., § 45-523, as added by 1993, ch. 378, § 8, p. 1386.]

**45-524. Release of lien on real property by posting surety bond — Exception to sufficiency of surety.** — (1) The lien claimant may, within two (2) days after the service of a copy of the petition for release of the lien with a copy of the bond attached thereto pursuant to section 45-520, Idaho Code, file with the clerk of the court in the action a notice excepting to the sufficiency of the surety on the bond, and shall, at the same time and together with that notice, file an affidavit setting forth the grounds and basis of the exceptions to the surety, and shall serve a copy of the notice and a copy of the affidavit upon the attorney or the petitioner on the same date as the date of filing of the notice and affidavit. A hearing must be had upon the justification of the surety at the same time as that set for the hearing on the petition for an order to release the lien.

(2) If the lien claimant fails to file and serve the notice and affidavit within two (2) days after the service of the petition for release of the lien, he shall be deemed to have waived all objection to the justification and sufficiency of the surety. [I.C., § 45-524, as added by 1993, ch. 378, § 9, p. 1386.]

**45-525. General contractors — Residential property — Disclosures.** — (1) Legislative intent. This section is intended to protect owners and purchasers of residential real property by requiring that general contractors provide adequate disclosure of potential liens.

(2) General contractor information. Prior to entering into any contract in an amount exceeding two thousand dollars (\$2,000) with a homeowner or residential real property purchaser to construct, alter or repair any improvements on residential real property, or with a residential real property purchaser for the purchase and sale of newly constructed property, the general contractor shall provide to the homeowner a disclosure statement setting forth the information specified in this subsection. The statement shall contain an acknowledgment of receipt to be executed by the

homeowner or residential real property purchaser. The general contractor shall retain proof of receipt and shall provide a copy to the homeowner or residential real property purchaser. The disclosure shall include the following:

(a) The homeowner or residential real property purchaser shall have the right at the reasonable expense of the homeowner or residential real property purchaser to require that the general contractor obtain lien waivers from any subcontractors providing services or materials to the general contractor;

(b) The homeowner or residential real property purchaser shall have the right to receive from the general contractor proof that the general contractor has a general liability insurance policy including completed operations in effect and proof that the general contractor has worker's compensation insurance for his employees as required by Idaho law;

(c) The homeowner or residential real property purchaser shall be informed of the opportunity to purchase an extended policy of title insurance covering certain unfiled or unrecorded liens; and

(d) The homeowner or residential real property purchaser shall have the right to require, at the homeowner's or residential real property purchaser's expense, a surety bond in an amount up to the value of the construction project.

(3) Subcontractor, materialmen and rental equipment information.

(a) A general contractor shall provide to a prospective residential real property purchaser or homeowner a written disclosure statement, which shall be signed by the general contractor listing the business names, addresses and telephone numbers of all subcontractors, materialmen and rental equipment providers having a direct contractual relationship with the general contractor and who have supplied materials or performed work on the residential property of a value in excess of five hundred dollars (\$500). A general contractor is not required under this subsection to disclose subcontractors, materialmen or rental equipment providers not directly hired by or directly working for the general contractor. Such information shall be provided within a reasonable time prior to:

(i) The closing on any purchase and sales agreement with a prospective residential real property purchaser; or

(ii) The final payment to the general contractor by a homeowner or residential real property purchaser for construction, alteration, or repair of any improvement of residential real property.

(b) All subcontractors, materialmen and rental equipment providers listed in the disclosure statement are authorized to disclose balances owed to the prospective real property purchasers or homeowners and to the agents of such purchasers or homeowners.

(c) The general contractor shall not be liable for any error, inaccuracy or omission of any information delivered pursuant to this section if the error, inaccuracy or omission was not within the personal knowledge of the general contractor.

(4) Failure to disclose. Failure to provide complete disclosures as required by this section to the homeowner or prospective residential real



property purchaser shall constitute an unlawful and deceptive act or practice in trade or commerce under the provisions of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(5) Definitions. For purposes of this section:

(a) "General contractor" means a person who enters into an agreement in excess of two thousand dollars (\$2,000) with:

(i) A homeowner or prospective residential real property purchaser for the construction, alteration or repair of residential real property; or

(ii) A prospective residential real property purchaser for the purchase and sale of newly constructed property.

The term "general contractor" does not include subcontractors, materialmen or rental equipment providers who do not have a direct contractual relationship with the homeowner or residential real property purchaser.

(b) "Residential real property" shall include owner and nonowner occupied real property consisting of not less than one (1) nor more than four (4) dwelling units. [I.C., § 45-525, as added by 2002, ch. 307, § 2, p. 876.]

**Compiler's notes.** Section 1 of S.L. 2002, ch. 307 is compiled as § 45-207.

## CHAPTER 6

### CLAIMS FOR WAGES

#### SECTION.

45-601. Definitions.

45-602. Wages of employees preferred.

45-603. Preference of wages — Death of employer.

45-604. Preference of wages on execution and attachment.

45-605. Debtor or creditor may dispute claim.

45-606. Payment of wages upon separation from employment.

45-607. Penalty for failure to pay.

45-608. Pay periods — Penalty.

45-609. Withholding of wages.

45-610. Records to be kept by employer — Notice to employees.

45-611. Wages that are in dispute.

#### SECTION.

45-612. Filing false claim — Penalty.

45-613. Discharging or retaliating against employees asserting rights under this chapter.

45-614. Collection of wages — Limitations.

45-615. Collection of wage claims by suit — Attorney's fees and costs.

45-616. Enforcement.

45-617. Administrative proceedings for wage claims.

45-618. Administrative enforcement and collection of wage claims.

45-619. Judicial review.

45-620. Liens.

45-621. Collection of lien amounts.

**45-601. Definitions.** — Whenever used in this chapter:

(1) "Claimant" means an employee who filed a wage claim with the department in accordance with this chapter and as the director may prescribe.

(2) "Department" means the department of labor.

(3) "Director" means the director of the department of labor.

(4) "Employee" means any person suffered or permitted to work by an employer.

(5) "Employer" means any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the

estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person.

(6) "Wage claim" means an employee's claim against an employer for compensation for the employee's own personal services, and includes any wages, penalties, or damages provided by law to employees with a claim for unpaid wages.

(7) "Wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis. [I.C., § 45-609, as added by 1967, ch. 436, § 1, p. 1469; am. 1974, ch. 39, § 72, p. 1023; am. and redesign. 1989, c. 280, § 1, p. 677; am. 1996, ch. 421, § 34, p. 1406; am. 1999, ch. 51, § 2, p. 115.]

**Compiler's notes.** Former § 45-601 was amended and redesignated as § 45-602 by § 2 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-609.

The title to S.L. 1967, ch. 436, stated that it was an act to amend chapter 6 of title 44 and the amending clauses of §§ 1-6 thereof stated that title 44 was amended by adding certain designated sections and designating such sections as §§ 45-609 — 45-615.

The amending clause of this section read: "Section 1. That chapter 6 of title 44, Idaho Code, be, and the same is hereby amended by adding a new section thereto, following section 45-608, to be known and designated as section 45-609, and to read as follows."

The words "this act" refer to S.L. 1967, ch. 436, §§ 1-6 compiled as §§ 45-609 — 45-613 and 45-615.

Section 71 of S.L. 1974, ch. 39 is compiled as § 44-1704.

Sections 33 and 35 of S.L. 1996, ch. 421 are compiled as §§ 44-2106 and 45-606, respectively.

Section 1 of S.L. 1999, ch. 51, is compiled as § 44-1508.

**Cited in:** *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977); *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984); *Latham v. Haney Seed Co.*, 119 Idaho 412, 807 P.2d 630 (1991).

#### ANALYSIS

**Applicability.**

**Constitutionality.**

**Employee.**

**Purpose.**

**Wages.**

— Insurance policy.

#### **Applicability.**

By using the term "employee," the legislature indicated that the provisions of this chapter should apply only to employees, not independent contractors. *Ostrander v. Farm Bureau Mut. Ins. Co.*, 123 Idaho 650, 851 P.2d 946 (1993).

#### **Constitutionality.**

Defendant's contention that this chapter violates the contract clause of the United States Constitution was without merit; the constitutional impairment of contract clause protects only those contractual obligations already in existence at the time the disputed law is enacted, and Idaho's Wage Claim Act was first passed in 1893, well before the obligation in question. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

#### **Employee.**

When determining whether there exists an employee/employer relationship for the purpose of Idaho's wage claim statute, it is not the labels applied by the parties which control, but rather the actual indicia of such a relationship; the general test of an employee/employer relationship is the right to control work, and if the employer retains the right to control and to direct the activities of the employee in the details of work performed, and to determine the hours to be spent and the times to start and stop the work, the person performing work will be deemed an employee. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

#### **Purpose.**

The 1967 amendment to Idaho's claim for wages statutes was not intended to change the rule enunciated by previous cases which stopped the running of penalties upon a tender of the full amount of wages due. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978).

The purpose of the Wage and Hour Law is to ensure that employees receive compensation due to them upon termination of their employment. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

#### **Wages.**

Where an employer was preparing to sell a division of his company within 60 days and promised his employee a bonus of 60 days'



additional salary if the employee would remain with the company until the division was sold, such 60-day "pay bonus" was a wage, as defined in subdivision (3) [now (4)] of this section; thus, employer's refusal to pay such bonus subjected the employer to treble damages under former § 45-615(4). *Neal v. Idaho Forest Indus., Inc.*, 107 Idaho 681, 691 P.2d 1296 (Ct. App. 1984).

Funds held in a deferral account were "wages" under this section, where the funds were compensation earned in increments as services were performed and the funds were fully earned by the employee when placed in the account, and the fact that there was or could be a balance in the account when the employee terminated his employment did not mean the account was intended as a retirement or similar post-employment benefit.

*Bilow v. Preco, Inc.*, 132 Idaho 23, 966 P.2d 23 (1998).

#### —Insurance Policy.

In action for breach of employment contract, it was error for the trial judge to treat the cash value of the life insurance policy as wages under former § 45-615(4), where the proceeds of the policy were to be paid to the employee at retirement or to his heirs upon his death. The policy was a fixed benefit of employment status, and as such, it was not compensation earned in increments as services were performed, unlike wages, and also unlike compensation paid in direct consideration of services rendered, in amounts over and above an employee's regular paychecks. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

**45-602. Wages of employees preferred.** — In all assignments of property made by any person to trustees or assignees, or in proceedings in insolvency, an employee's wages for services rendered within sixty (60) days preceding such assignment, not exceeding five hundred dollars (\$500), is a preferred claim, and must be paid by such trustees or assignees before any creditor or creditors of the assignor or insolvent debtor; provided, that whenever any such employee has filed a notice of lien against any property of the assignor, the employee may elect between the provisions of this section and the employee's lien. [1893, p. 49, ch. 4, § 1; reen. 1899, p. 147, ch. 4, § 1; reen. R.C. & C.L., § 5145; C.S., § 7376; I.C.A., § 44-601; am. and redesisg. 1989, c. 280, § 2, p. 677; am. 1999, ch. 51, § 3, p. 115.]

**Compiler's notes.** Former § 45-602 was amended and redesignated as § 45-603 by § 3 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-601.

**Cross ref.** Employers to post and record statements for protection of laborers, § 44-501.

**Sec. to sec. ref.** This chapter is referred to in § 44-1508.

**Cited in:** *St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958); *Schoonover v. Bonner County*, 113 Idaho 916, 750 P.2d 95 (1988).

#### ANALYSIS

**Bank employee.**  
**Constitutionality.**  
**Purpose.**

#### Bank Employee.

An employee of an insolvent bank, which is being administered by the director of the department of finance, is not entitled to assert a preferred claim for wages earned within sixty days of the employer's insolvency, under this section. *Lloyd v. Diefendorf*, 54 Idaho 607, 34 P.2d 53 (1934).

Insofar as a claim for wages by a bank

employee is concerned, this section was superseded by § 26-905, and such claim must be presented in accordance with the provisions of such section. *Lloyd v. Diefendorf*, 54 Idaho 607, 34 P.2d 53 (1934).

#### Constitutionality.

Defendant's contention that this chapter violates the contract clause of the United States Constitution was without merit; the constitutional impairment of contract clause protects only those contractual obligations already in existence at the time the disputed law is enacted, and Idaho's Wage Claim Act was first passed in 1893, well before the obligation in question. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

#### Purpose.

The purpose of this chapter is to insure that employees receive compensation due and owing to them upon termination of their employment. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

**Collateral References.** Independence of a contract considered with relation to statutes creating liens for work or wages. 43 A.L.R. 335.

Liens for repairs to or services in connection with an automobile. 62 A.L.R. 1485.

Right of bailee and his employees to a lien

for repairs on aircraft. 69 A.L.R. 316; 83 A.L.R. 333; 99 A.L.R. 173.

**45-603. Preference of wages — Death of employer.** — In case of the death of any employer, the wages of each employee for services rendered within the sixty (60) days preceding the death of the employer, not exceeding five hundred dollars (\$500), rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering the estate, and the allowance of the surviving spouse and minor children, and must be paid before any other claims against the estate of the deceased person. [1893, p. 49, ch. 4, § 2; reen. 1899, p. 147, ch. 4, § 2; reen. R.C. & C.L., § 5146; C.S., § 7377; I.C.A., § 44-602; am. and redesign. 1989, c. 280, § 3, p. 677; am. 1999, ch. 51, § 4, p. 115.]

**Compiler's notes.** Former § 45-603 was redesignated as § 45-604 by § 4 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-602.

**45-604. Preference of wages on execution and attachment.** — In cases of executions, attachments and writs of similar nature, issued against any person or his property, except for claims for labor done, any employee who has claims against the defendant for labor done upon the property levied on, may give notice of their claim and the amount thereof, sworn to by the person making the claim, to the creditor or the creditor's agent or attorney and to the officer executing any of such writs, at any time before the actual sale of the property levied upon; and, unless such claim is disputed by the debtor or creditor, such officer must pay to such person out of the proceeds of the sale of any property on which such person has bestowed labor, the amount such person is entitled to receive for his services rendered within the sixty (60) days preceding the levy of the writ. If any or all other claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten (10) days for the recovery thereof, and must prosecute the action with due diligence or be forever barred from any claim of priority of payment thereof, and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action, and in case judgment be had for the claim or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim. [1893, p. 49, ch. 4, § 3; reen. 1899, p. 147, ch. 4, § 3; reen. R.C. & C.L., § 5147; C.S., § 7378; I.C.A., § 44-603; redesign. 1989, c. 280, § 4, p. 677; am. 1999, ch. 51, § 5, p. 115.]

**Compiler's notes.** Former § 45-604 was redesignated as § 45-605 by § 5 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-603.

**Cross ref.** Child support, wage assignment for, priority of, § 8-704.

**Collateral References.** Constitutionality of a statute giving a lien for wages on insolvency of an employer. 94 A.L.R. 1292.



**45-605. Debtor or creditor may dispute claim.** — The debtor or creditor intending to dispute a claim presented under the provisions of section 45-604, Idaho Code, shall, within ten (10) days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement in writing, verified by the oath of the debtor, or his agent or attorney, or the oath of the person disputing such claim, or his agent or attorney, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty (60) days preceding the levy of the writ. If the claimant brings suit on a claim which is disputed in part only, and fails to recover a sum exceeding that which was admitted to be due, the claimant shall not recover costs, but costs shall be adjudged against the claimant. [1893, p. 49, ch. 4, § 4; reen. 1899, p. 147, ch. 4, § 4; reen. R.C. & C.L., § 5148; C.S., § 7379; I.C.A., § 44-604; redesig. 1989, c. 280, § 5, p. 677; am. 1999, ch. 51, § 6, p. 115.]

**Compiler's notes.** Former § 45-605 was redesignated as § 45-615 by § 16 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-604.

**45-606. Payment of wages upon separation from employment.** — (1) Upon layoff, or upon termination of employment by either the employer or employee, the employer shall pay or make available at the usual place of payment all wages then due the employee by the earlier of the next regularly scheduled payday or within ten (10) days of such layoff or termination, weekends and holidays excluded. However, if the employee makes written request upon the employer for earlier payment of wages, all wages then due the employee shall be paid within forty-eight (48) hours of the receipt of such request, weekends and holidays excluded.

(2) Unless exempt from the minimum wage requirements of chapter 15, title 44, Idaho Code, employees who are not being paid on an hourly or salary basis must be paid at least the applicable minimum wage for all hours worked in the pay period immediately preceding layoff or termination from employment. The minimum wage payment shall be made within the same time limitations provided for in subsection (1) of this section. Any additional wages owed to employees shall be paid by the next regularly schedule payday.

(3) The director may, upon application showing good and sufficient reasons, grant an employer a temporary extension to any time limitation provided in this section. [I.C., § 45-606, as added by 1989, ch. 280, § 7, p. 677; am. 1996, ch. 421, § 35, p. 1406; am. 1999, ch. 51, § 7, p. 115.]

**Compiler's notes.** Former § 45-606, which comprised 1911, ch. 170, § 1, p. 565; reen. C.L., § 5148b; C.S., § 7381; I.C.A., § 44-606; am. 1982, ch. 336, § 1, p. 845 was repealed by S.L. 1989, ch. 280, § 6.

Sections 34 and 36 of S.L. 1996, ch. 421 are compiled as §§ 45-601 and 45-613, respectively.

**Sec. to sec. ref.** This section is referred to in § 45-617.

#### ANALYSIS

Employee terminating own employment.  
Treble damages.

**Employee Terminating Own Employment.**

Since the 1989 amendments to the Wage and Hour Law, employees who voluntarily terminate their employment may elect to recover the 30-day wage penalty. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

**Treble Damages.**

The district court's award of treble damages to the plaintiffs was affirmed because the employer failed to tender wages that were due and owing within 48 hours of the plaintiffs' written demand for wages. *Polk v. Robert D. Larrabee Family Home Ctr.*, 135 Idaho 303, 17 P.3d 247 (2000).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Application.

Attorney fees.

Constitutionality.

Construction.

Court costs.

Effect of tender.

Evidence and proof.

Exclusivity of remedies.

Payment by check.

Penalty.

Penalty denied in trial court — defendant appealing.

Penalty not assignable.

Penalty not dependent on lien.

Point at which wages become due.

Rational relation to state's interest.

Trial de novo.

**Application.**

Former similar law applied to employer of labor and not owner of property on which work was done. *Fenn. v. Latour Creek R. Co.*, 29 Idaho 521, 160 P. 941 (1916).

Former similar law did not create lien in favor of boardinghouse keeper, or person furnishing feed to horses, or for horse hire to contractor, on property of railroad. *Fenn. v. Latour Creek R. Co.*, 29 Idaho 521, 160 P. 941 (1916).

In order to come within terms of former similar law, complainant must have been discharged. *Marrs v. Oregon Short Line R.R.*, 33 Idaho 785, 198 P. 468 (1920); *Goodell v. Pope-Shenon Mining Co.*, 36 Idaho 427, 212 P. 342 (1922).

Because of the exclusive nature of former § 45-615(4), it may be utilized in situations where an employee voluntarily terminates his or her employment, even though former similar section was applicable only in situations where an employee is discharged. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

Former § 45-606 set forth two separate situations where recovery is allowed. Under the first alternative, wages or salary are due an employee at the time the employer discharges or lays off that employee. In the second alternative, the employee need not be discharged or laid off by their employer. The employee simply has to make a demand for

wages or salary due and owing to him under his contract of employment. *Kalac v. Canyon County*, 119 Idaho 650, 809 P.2d 511 (Ct. App. 1990).

**Attorney Fees.**

A demand in writing for wages due as required by § 45-605 was made as shown by the record in action for wages with the notification that if payment was not received within five days and suit was thereafter brought, attorney fees and penalty would be sought as provided in this section and upon action being thus brought, attorneys fees in the amount of \$700 were stipulated and agreed upon. *O'Harrow v. Salmon River Uranium Dev., Inc.*, 84 Idaho 427, 373 P.2d 336 (1962).

**Constitutionality.**

Former similar law was legitimate exercise of police power of state, and was not an infringement upon the liberty of contract in respect to labor, and did not deprive employer or employee of the liberty or right to enter into any contract, nor take property from employer without due process of law, nor single out any particular class of debtors or individuals, and was not unconstitutional as being in contravention of Art. 1, § 10 of the Constitution of the United States, or of § 1 of the Fourteenth Amendment to the Constitution of the United States, or of Const., Art. 1, §§ 13 and 16. *Olson v. Idora Hill Mining Co.*, 28 Idaho 504, 155 P. 291 (1916); *Marrs v. Oregon Short Line R.R.*, 33 Idaho 785, 198 P. 468 (1921).

**Construction.**

It was not the intention of legislature to penalize employer for failing to pay an unjust debt, nor for failure to pay when discharged laborer, after demanding payment, prevents compliance with demand by his own conduct, nor to deny or preclude right of employer to interpose any valid counterclaim or defense to claim of such laborer. *Olson v. Idora Hill Mining Co.*, 28 Idaho 504, 155 P. 291 (1916); *Goodell v. Pope-Shenon Mining Co.*, 36 Idaho 427, 212 P. 342 (1922).

Former similar law did not require that demand be made in writing or that any amount should be named by claimant. *Marrs*



v. Oregon Short Line R.R., 33 Idaho 785, 198 P. 463 (1921).

It is the purpose of former similar law to impose penalty upon employer in case of his failure to pay employee wages earned when due, after proper demand has been made therefor. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921); *Goodell v. Pope-Shenon Mining Co.*, 36 Idaho 427, 212 P. 342 (1922).

When a man employed as manager of a service station was discharged and not paid either his salary or commissions due, he was entitled to recover his salary, commissions and salary for the 30 day period following his discharge. *Kingsford v. Bennion*, 68 Idaho 501, 199 P.2d 625 (1948).

#### **Court Costs.**

Employer in suit to recover wages, penalties and attorney fees was liable for court costs where tender of amount of wages due was not paid into court. *Lindsey v. McCatron*, 78 Idaho 211, 299 P.2d 496 (1956).

#### **Effect of Tender.**

Running of penalty is stopped by tender of wages due. Employee, however, has right to bring suit for penalty that had accrued up to that time. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921); *Lindsey v. McCatron*, 78 Idaho 211, 299 P.2d 496 (1956).

#### **Evidence and Proof.**

Where plaintiff was paid \$2.50 an hour and claimed \$3.04 an hour, but failed to prove either an agreement as to amount of wages or the standard, reasonable, or going wage for like services, evidence that employees who were members of a union, to which plaintiff did not belong, received \$3.04 an hour was insufficient to entitle plaintiff to judgment for the difference between \$2.50 and \$3.04 an hour. *Grieser v. Haynes*, 89 Idaho 198, 404 P.2d 333 (1965).

#### **Exclusivity of Remedies.**

Suit for back wages along with 30 days additional wages under former similar law and suit for treble damages under former § 45-615(4) are mutually exclusive remedies. *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977).

Under the Wage and Hour Law, an employee whose wages are not fully paid upon termination is entitled to alternative remedies; one remedy is to recover damages for a 30-day period after the date of termination from employment, and the other remedy is to recover, as damages, treble the amount of wages found due and owing — these remedies, however, are mutually exclusive. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

#### **Payment by Check.**

Checks of employer constituted the equivalent of cash where employer always paid by check and employee had accepted payment by check prior to his layoff or discharge. *Lindsey v. McCatron*, 78 Idaho 211, 299 P.2d 496 (1956).

#### **Penalty.**

The amount paid in case of "such default" of payment of wages by employer is classified as a penalty. *Lindsey v. McCatron*, 78 Idaho 211, 299 P.2d 496 (1956).

#### **Penalty Denied in Trial Court — Defendant Appealing.**

Where plaintiff brings an action seeking to recover wages and penalty for nonpayment, and the trial court holds against him with respect to the penalty for such nonpayment, and defendant appeals, the Supreme Court will not reverse the ruling of the court on denial of the penalty. *People ex rel. Heartburg v. Interstate Eng'g. & Constr. Co.*, 58 Idaho 457, 75 P.2d 997 (1937).

#### **Penalty Not Assignable.**

Right to recover penalty is personal and cannot be assigned. *Robinson v. St. Maries Lumber Co.*, 34 Idaho 707, 204 P. 671 (1921).

#### **Penalty Not Dependent on Lien.**

Where plaintiff sought to enforce farm laborer's lien and also to hold owner liable for penalty under former similar law, personal judgment against defendant could be entered, although proof of lien failed. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

#### **Point at Which Wages Become Due.**

It would be unreasonable to conclude an employee's wages do not become due until after he has completed the employer's grievance proceedings. Such an interpretation of former § 45-606 would compromise the purpose of the Idaho wage claim statutes—to compensate terminated employees as soon as possible. *Kalac v. Canyon County*, 119 Idaho 650, 809 P.2d 511 (Ct. App. 1990).

#### **Rational Relation to State's Interest.**

The penalty provisions of the Wage and Hour Law are rationally related to the state's overall interest in protecting wage earners. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

#### **Trial De Novo.**

Where plaintiff sued defendants in probate court for wages, attorney fees, and penalty based on joint liability of defendants as partners, but recovered judgment against one defendant only, and plaintiff appealed to district court the whole case was before the district court for a trial de novo. *Davis v. Parkin*, 75 Idaho 266, 270 P.2d 1007 (1954).

**45-607. Penalty for failure to pay.** — Whenever an employer fails to pay all wages then due an employee at the times due under section 45-606, Idaho Code, then the employee's wages shall continue at the same rate as if services had been rendered in the manner as last employed until paid in full or for fifteen (15) days, whichever is less. However, in no event can the maximum penalty exceed seven hundred fifty dollars (\$750), and if the full amount of the wages are paid prior to the filing of a lien pursuant to section 45-620, Idaho Code, the maximum penalty shall not exceed five hundred dollars (\$500).

Any employee who secretes or absents himself to avoid payment, or refuses to receive payment when made available as provided for in section 45-606, Idaho Code, shall not be entitled to any penalty under this chapter. [1911, ch. 170, § 2, p. 565; reen. C.L., § 5148c; C.S., § 7382; I.C.A., § 44-607; am. 1989, ch. 280, § 8, p. 677; am. 1996, ch. 165, § 1, p. 547; am. 1999, ch. 51, § 8, p. 115.]

**Cross ref.** See note, § 45-606. *Olson v. Idora Hill Mining Co.*, 28 Idaho 504, 155 P. 291 (1916).

**Sec. to sec. ref.** This section is referred to in §§ 45-615 and 45-617.

#### ANALYSIS

Exclusivity of remedies.

Purpose.

Rational relation to state's interest.

#### Exclusivity of Remedies.

Under the Wage and Hour Law, an employee whose wages are not fully paid upon termination is entitled to alternative remedies; one remedy is to recover damages for a 30-day period after the date of termination from employment, and the other remedy is to recover, as damages, treble the amount of wages found due and owing — these reme-

dies, however, are mutually exclusive. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

#### Purpose.

The penalty provisions of the Wage and Hour Law serve as a means to compensate an employee for the time and expense of securing unpaid wages, and to encourage employers to tender those wages before the employee has to resort to the courts to secure payment. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

#### Rational Relation to State's Interest.

The penalty provisions of the Wage and Hour Law are rationally related to the state's overall interest in protecting wage earners. *De Witt v. Medley*, 117 Idaho 744, 791 P.2d 1323 (Ct. App. 1990).

**45-608. Pay periods — Penalty.** — (1) Employers shall pay all wages due to their employees at least once during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks on banks where suitable arrangements are made for the cashing of such checks without charge to the employee. Nothing contained herein shall prohibit an employer from depositing wages due or to become due or an advance of wages to be earned in an account in a bank, savings and loan association or credit union of the employee's choice, provided that the employee has voluntarily authorized such deposit. If the employee revokes such authorization for deposit, it shall be deemed terminated and the provisions herein relating to the payment of wages shall apply.

(2) The end of the pay period for which payment is made on a regular payday shall be not more than fifteen (15) days before such regular payday; provided that if the regular payday falls on a nonworkday payment shall be made on a preceding workday.



(3) The director may, upon application showing good and sufficient reasons, permit an employer to withhold payment of wages more than the fifteen (15) day period as specified in subsection (2) of this section.

(4) The director may, pursuant to his authority, levy a civil penalty upon any employer who has failed to obtain the exemption provided in subsection (3) of this section and who has been determined to have undertaken a consistent pattern of untimely payment of wages to his employees. Such penalty shall not exceed five hundred dollars (\$500) for such employer per pay period. [I.C., § 45-610, as added by 1967, ch. 436, § 2, p. 1469; am. 1974, ch. 39, § 73, p. 1023; am. 1985, ch. 132, § 1, p. 326; am. and redesisg. 1989, c. 280, § 9, p. 677; am. 1999, ch. 51, § 9, p. 115.]

**Compiler's notes.** Former § 45-608 was amended and redesignated as § 45-614 by § 15 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-610.

The amending clause of section 2 of S.L. 1965, ch. 436, read: "Section 2. That chapter 6 of title 44, Idaho Code, be, and the same is hereby amended by adding a new section thereto, following section 45-609, to be known and designated as section 45-610, and to read as follows." See Compiler's note under § 45-609.

Section 74 of S.L. 1974, ch. 39 is compiled as § 45-616.

#### ANALYSIS

**Application.**

No contract of employment.

**Application.**

Where employer insured employee's life,

the policies to vest in employee if employer went out of business, these benefits were not attributed to, or earned in a specific pay period, but were earned over the entire course of the employment relationship, and this section applies to an action to recover retirement benefits such as those in this case. *Latham v. Haney Seed Co.*, 119 Idaho 412, 807 P.2d 630 (1991).

#### No Contract of Employment.

Plaintiff was not entitled to wages for duties performed as acting lieutenant/jail commander before sheriff appointed him to that position where county commissioners had not approved the position; sheriff did not have the power to contract with plaintiff for a position that the commissioners had not created. *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

**45-609. Withholding of wages.** — (1) No employer may withhold or divert any portion of an employee's wages unless:

(a) The employer is required or empowered to do so by state or federal law; or

(b) The employer has a written authorization from the employee for deductions for a lawful purpose.

(2) An employer shall furnish each employee with a statement of deductions made from the employee's wages for each pay period such deductions are made. The willful failure of any employer to comply with the provisions of this subsection shall constitute a misdemeanor. [I.C., § 45-611, as added by 1967, ch. 436, § 3, p. 1469; am. and redesisg. 1989, c. 280, § 10, p. 677; am. 1999, ch. 51, § 10, p. 115.]

**Compiler's notes.** Former § 45-609 was amended and redesignated as § 45-601 by § 1 of S.L. 1989, ch. 280.

This section was formerly compiled as § 45-611.

The amending clause of section 3 of S.L.

1967, ch. 436, read: "Section 3. That chapter 6 of title 44, Idaho Code, be, and the same is hereby amended by adding a new section thereto, following section 45-610, to be known and designated as section 45-611, and to read as follows." See Compiler's note under § 45-609.

## ANALYSIS

Deduction of wages.  
 Employment at will.  
 Evidence of illegal withholding.  
 Ground for terminating employment.  
 Written authorization.

**Deduction of Wages.**

Where an employee quit rather than work under a procedure whereby money would be deducted from her wages until she redid work to her employer's satisfaction, substantial evidence supported the Industrial Commission's findings that she quit for good cause and was eligible for unemployment benefits. *Wood v. Quali-Dent Dental Clinics*, 107 Idaho 1020, 695 P.2d 405 (1985).

**Employment at Will.**

The "employment at will" doctrine is applicable solely to actions for wrongful discharge, not to actions for unemployment compensation benefits. *Stevenson v. TR Video, Inc.*, 112 Idaho 1081, 739 P.2d 380 (1987).

**Evidence of Illegal Withholding.**

Sufficient facts were placed before the Industrial Commission to raise the issue of an illegal withholding under this section, where the employee alleged the existence of a binding oral contract between himself and his employer concerning his wages, he alleged a unilateral breach of that contract by his em-

ployer which resulted in a withholding of a portion of his wages due under the terms of the oral contract, and the employer took the position before the appeals examiner that his actions changing the oral agreement were mandated by a federal labor law. *Stevenson v. TR Video, Inc.*, 112 Idaho 1081, 739 P.2d 380 (1987).

**Ground for Terminating Employment.**

An employer's violation of this section gives the aggrieved employee good cause as a matter of law for leaving his employment if the amount withheld was not trivial, and the employee's attempt to settle the matter with his employer was rebuffed. *Stevenson v. TR Video, Inc.*, 112 Idaho 1081, 739 P.2d 380 (1987).

**Written Authorization.**

When an employer, without employee's written authorization, withheld amounts from employee's wages representing the value of supplies and building materials employee had received from employer, the withholding was in violation of employee's statutory rights. *Smith v. Johnson's Mill*, 96 Idaho 760, 536 P.2d 755 (1975).

**Collateral References.** 33 Am. Jur. 2d, Federal Taxation, paragraphs § 740 et seq.

Garnishment of salary, wages, or commissions where defendant debtor is indebted to garnishee-employer. 93 A.L.R.2d 995.

**45-610. Records to be kept by employer — Notice to employees. —**

(1) Employment records must be maintained for a minimum period of three (3) years from the last date of the employee's service.

(2) Every employer shall give notice to its employees at the time of hiring of the rate of pay and the usual day of payment, and shall provide such information in writing to the employee upon the employee's request.

(3) Every employer shall give notice to its employees of any reduction in wages prior to the work being performed and shall provide such information in writing to the employee upon the employee's request. [I.C., § 45-610, as added by 1989, ch. 280, § 11, p. 677; am. 1999, ch. 51, § 11, p. 115.]

**Compiler's notes.** Former § 45-610 was amended and redesignated as § 45-608 by § 9 of S.L. 1989, ch. 280.

Section 74 of S.L. 1974, ch. 39 is compiled as § 45-616.

**45-611. Wages that are in dispute. —** (1) In case of a dispute as to the amount of wages due an employee, the employer shall pay, without condition and within the time set by this chapter, all wages, or parts thereof, conceded by the employer to be due, leaving to the employee all remedies the employee might otherwise be entitled to, including those provided under this chapter, as to any balance claimed. Whenever an employer pays all wages not in dispute within the time limits set forth in section 45-606, Idaho Code, no penalties may be assessed under this chapter, unless it can be



shown that the remaining balance of wages due were withheld willfully, arbitrarily and without just cause.

(2) The acceptance by an employee of a check with any restrictive endorsement as payment under this section shall not constitute a release or accord and satisfaction with respect to the disputed amount. [I.C., § 45-611, as added by 1989, ch. 280, § 12, p. 677; am. 1999, ch. 51, § 12, p. 115.]

**Compiler's notes.** Former § 45-611 was amended and redesignated as § 45-609 by § 10 of S.L. 1989, ch. 280.

ANALYSIS

Award by court.  
Legislative intent.

**Award by Court.**

When a statute allows an award beyond actual damages, the court must decide whether the award is intended to be a penalty or compensation. If it is intended to be a

penalty, the statute's requirements must be strictly construed; if it is intended to be compensatory, the statutory requirements are not to be strictly construed. *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

**Legislative Intent.**

The legislature did not intend the word "penalty", as used in this section, to refer to the award of treble damages under § 45-617(4). *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

**45-612. Filing false claim — Penalty.** — (1) Any person making a false claim for wages or other compensation under this chapter, knowing the same to be false, shall be guilty of a misdemeanor and shall be punishable by confinement in the county jail for a period not to exceed six (6) months, or by a fine, not to exceed one thousand dollars (\$1,000), or both.

(2) Any employee initiating a civil proceeding to collect unpaid wages or other compensation, which is based in whole or in part on a false claim which the employee knew to be false at the time the employee brought the action, shall be liable for attorney's fees and costs incurred by the employer in defending against the false claim. Proof of a criminal conviction under subsection (1) of this section shall not be required for recovery of the fees and costs provided for in this subsection. [I.C., § 45-612, as added by 1996, ch. 89, § 1, p. 270; am. 1999, ch. 51, § 13, p. 115.]

**Compiler's notes.** Former § 45-612, which comprised I.C., § 45-612, as added by 1967, ch. 436, § 4, p. 1469, was repealed by

S.L. 1989, ch. 280, § 13.

Cited in: *Zattiero v. Homedale Sch. Dist.* No. 370, 137 Idaho 568, 51 P.3d 382 (2002).

**45-613. Discharging or retaliating against employees asserting rights under this chapter.** — No employer shall discharge or in any other manner retaliate against any employee because that employee has made a complaint to the employer, or to the department, or filed suit alleging that the employee has not been paid in accordance with the provisions of this chapter, or because the employee has testified or may be about to testify in an investigation or hearing undertaken by the department. The provisions of this section shall not be construed to otherwise restrict the discipline or termination of an employee. [I.C., § 45-613, as added by 1989, ch. 280, § 14, p. 677; am. 1996, ch. 421, § 36, p. 1406; am. 1999, ch. 51, § 14, p. 115.]

**Compiler's notes.** Former § 45-613 was amended and redesignated as § 45-616 by § 17 of S.L. 1989, ch. 280.

Sections 35 and 37 of S.L. 1996, ch. 421 are compiled as §§ 45-606 and 45-617, respectively.

**45-614. Collection of wages — Limitations.** — Any person shall have the right to collect wages, penalties and liquidated damages provided by any law or pursuant to a contract of employment, but any action thereon shall be filed either with the department or commenced in a court of competent jurisdiction within two (2) years after the cause of action accrued, provided, however, that in the event salary or wages have been paid to any employee and such employee claims additional salary, wages, penalties or liquidated damages, because of work done or services performed during his employment for the pay period covered by said payment, any action therefor shall be commenced within six (6) months from the accrual of the cause of action. It is further provided that if any such cause of action has accrued prior to the effective date of this act, and is not barred by existing law, action thereon may be commenced within six (6) months from the effective date of this act. In the event an action is not commenced as herein provided, any remedy on the cause of action shall be forever barred. [I.C.A., § 44-608, as added by 1947, ch. 36, § 1, p. 36; am. and redesig. 1989, ch. 280, § 15, p. 677; am. 1999, ch. 51, § 15, p. 115.]

**Compiler's notes.** This section was formerly compiled as § 45-608.

**Sec. to sec. ref.** This section is referred to in § 45-617.

**Cited in:** Mathauser v. Hellyer, 98 Idaho 235, 560 P.2d 1325 (1977).

#### ANALYSIS

Claims for additional salary.

Instructions.

Issues.

Overtime.

Remuneration of partners.

Severance pay.

When statute begins to run.

#### Claims for Additional Salary.

The proviso in the first sentence of this section refers to a claim for additional salary for a specific pay period from which an employee has already received some payment of salary or wages; the term pay period does not refer to the entire course of an employment relationship. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984).

#### Instructions.

Jurors should have been instructed by the court as to whether defendant's first four payments to plaintiff constituted payment of wages for the pay periods covered by such payments and whether the action by plaintiff was for additional wages claimed for those pay periods and consequently was barred by the 6-months provision; the jurors should have been instructed if they found the first four payments were on account as claimed by plaintiff, then his action was not barred but if such payments were made in the manner claimed by defendant, then the action as to

the four pay periods was barred. *Anderson v. Lee*, 86 Idaho 220, 386 P.2d 54 (1963).

Where employment agreement which set an agreed hourly wage was indefinite as to duration and time for payment of wages it was a question of fact whether employer's first four payments constituted wages for the pay periods, so as to render employee's action for additional wages claimed for those four pay periods barred by the six-month statute of limitations; and jurors should have been instructed that if the first four payments were made on account, as claimed by employee, his action was not barred. *Anderson v. Lee*, 86 Idaho 300, 386 P.2d 54 (1963).

#### Issues.

Where, more than six months but less than two years after his employment was terminated, employee brought action against employer for wages, and employer counter-claimed and alleged action was barred by statute of limitations under this section, whether payments made by employer were for all work up to each respective payment and made the six-month statute of limitations on additional wage claims applicable, or whether they were on account, for no particular period, making the limitation statute inapplicable, were issues of fact. *Anderson v. Lee*, 86 Idaho 300, 386 P.2d 54 (1963).

#### Overtime.

Where the school district could have compensated the employee for his overtime work any time during the term of his contract, it was not until that contract expired that his cause of action then accrued, for it is only then that he knew that he would not be compensated for the unpaid overtime. *Gilbert v. Moore*, 108 Idaho 165, 697 P.2d 1179 (1985).



Where the longstanding practice of the county was to pay all overtime accrued upon termination, and the sheriff's action was filed within one month of his termination of employment, the county's assertion of the defense of failure to file within the statutory period was without merit. *Schoonover v. Bonner County*, 113 Idaho 916, 750 P.2d 95 (1988).

#### **Remuneration of Partners.**

Partner's claim for "unpaid additional wages" was subject to the six-month limitation period expressed in this section, and did not fall under §§ 53-321 (now repealed) and 53-323 (now repealed) as "remuneration" of partners. *Callenders, Inc. v. Beckman*, 120 Idaho 169, 814 P.2d 429 (Ct. App. 1991).

#### **Severance Pay.**

A claim for severance pay is a component of the compensation in an employment agreement since severance pay is not a mere gratuity; thus, a claim for severance pay comes within the parameters of this section. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984).

Because severance pay is not attributed to, or earned in a specific pay period, but, is earned over the entire course of the employment relationship, the six-month limitation period is inapplicable to a claim for severance pay; rather, the two-year period is applicable. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984).

Employee had a right to collect his severance pay upon either his retirement or involuntary termination and where suit for sever-

ance pay was initiated less than two years from employee's involuntary termination, the claim was not barred by the two-year limitation period. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984).

#### **When Statute Begins to Run.**

If the payments made by defendant were on account as claimed by plaintiff employee, then no particular pay period was covered by such payments, and the six-month limitation for commencing suit would not apply because in such case plaintiff would not be claiming additional wages for the pay period covered by any of the payments made; his claim, in that case, would be for an unpaid balance applicable to the entire period of his employment, but, if on the other hand, such four payments were to cover the full amount earned by plaintiff up to the time of making the payments, plaintiff's action would be barred by the six months provision. *Anderson v. Lee*, 86 Idaho 220, 386 P.2d 54 (1963).

Where one was employed from calendar year to calendar year at a fixed salary with a bonus of 25% of profits of business at end of each calendar year and was wrongfully discharged in February, the claim for salary to the end of the year and the bonus for such year was governed by the two-year limitation and not the six-month. *Thomas v. Ballou-Latimer Drug Co.*, 92 Idaho 337, 442 P.2d 747 (1968).

A cause of action accrues under this section when an employee has a right to collect the salary or wages, etc., that are allegedly owed to him. *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984).

**45-615. Collection of wage claims by suit — Attorney's fees and costs.** — (1) As an alternative to filing a wage claim with the department, any person may assert a wage claim arising under this chapter in any court of competent jurisdiction or pursue any other remedy provided by law.

(2) Any judgment rendered by a court of competent jurisdiction for the plaintiff in a suit filed pursuant to this section may include all costs and attorney's fees reasonably incurred in connection with the proceedings and the plaintiff shall be entitled to recover from the defendant either the unpaid wages plus the penalties provided for in section 45-607, Idaho Code; or damages in the amount of three (3) times the unpaid wages found due and owing, whichever is greater. [I.C., § 45-615, as added by 1999, ch. 51, § 17, p. 115.]

**Compiler's notes.** Former § 45-615, which comprised I.C., § 45-615, as added by 1899, p. 394, § 1; reen. R.C., § 4919; am. 1915, ch. 70, § 1, p. 180; reen. C.L., § 5148a;

C.S., § 7380; I.C.A., § 44-605; am. and redesign. 1989, ch. 280, § 16, p. 677; am. 1990, ch. 226, § 1, p. 603, was repealed by S.L. 1999, ch. 51, § 16, effective July 1, 1999.

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Amount of demand.  
Employee.  
Extinguishment of right.  
Rejection of award.  
Sufficiency of evidence.  
Trebble damages.  
Trial de novo.  
When fees allowable.

**Amount of Demand.**

Attorney fees are not awarded when the employee's written demand for past due wages exceeds the amount of wages awarded by the district court, even if the difference between the amounts is relatively minor. *Shay v. Cesler*, 132 Idaho 585, 977 P.2d 199 (1999).

**Employee.**

A county sheriff is not an "employee" for purposes of the attorney fees provided in this section. *LaBrosse v. Board of Comm'rs*, 105 Idaho 730, 672 P.2d 1060 (1983).

**Extinguishment of Right.**

Tender of amount of wages due prior to date of written demand extinguishes employee's right to attorney fees. *Lindsey v. McCatron*, 78 Idaho 211, 299 P.2d 496 (1956).

**Rejection of Award.**

Plaintiff's statement that he would reject an award of \$1.00 in attorney's fees, the amount originally sought, destroys the effect of the demand. *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

**Sufficiency of Evidence.**

Evidence was sufficient to warrant a recovery for work and labor performed, so as to bring it within the terms of this section. *Harp v. Stonebraker*, 57 Idaho 434, 65 P.2d 766 (1937).

**Trebble Damages.**

The district court's award of treble damages to the plaintiffs was affirmed because the employer failed to tender wages that were due and owing within 48 hours of the plaintiffs' written demand for wages. *Polk v. Robert D. Larrabee Family Home Ctr.*, 135 Idaho 303, 17 P.3d 247 (2000).

**Trial De Novo.**

Where plaintiff sued defendants in probate court for wages, attorney fees, and penalty based on joint liability of defendants as partners, but recovered judgment against one defendant only, and plaintiff appealed to district court the whole case was before the district court for a trial de novo. *Davis v. Parkin*, 75 Idaho 266, 270 P.2d 1007 (1954).

**When Fees Allowable.**

Attorneys' fees cannot be allowed where demand was for amount exceeding that which could be found due for wages. *Marrs v. Oregon Short Line R.R.*, 33 Idaho 785, 198 P. 468 (1921).

Liability under former § 45-615 did not arise from failure to pay amount demanded, but upon failure to pay any wages or salary due upon demand. *Marrs v. Oregon Short Line R.R.*, 33 Idaho 785, 198 P. 468 (1921).

In claim for wages, where no written demand is made by plaintiff, it is error to allow him attorney's fees. *Cosner v. United Mines Co.*, 33 Idaho 801, 198 P. 472 (1921).

There could be no recovery of attorney's fees unless amount sought was justly due and employee has made proper demand for such amount according to provisions of former § 45-615. *Goodell v. Pope-Shenon Mining Co.*, 36 Idaho 427, 212 P. 342 (1922).

In absence of allegation that five days' demand of payment had been made in writing, attorney's fees cannot be allowed. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

Attorney's fees in foreclosure of lien actions are incidental to foreclosure, and when no lien is foreclosed no fees can be allowed. *Backman v. Douglas*, 46 Idaho 671, 270 P. 618 (1928).

Where in a claim for wages no demand was made in writing by discharged employee in accordance with the provisions of former § 45-615, it was error to allow attorney fees to such employee. *Kingsford v. Bennion*, 68 Idaho 501, 199 P.2d 625 (1948).

Where respondent brought suit for the recovery of his wages earned and due according to the terms of his employment and established that the amount for which he brought suit, \$543.74, was justly due less legal deductions and that tender made by appellant of \$333.14 was considerably less than that amount, and that he had made due demand for a sum not to exceed the amount found due less legal deductions, such respondent became entitled to recovery of attorneys' fees to be taxed as costs of suit. *St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958).

A demand in writing for wages due as required by former § 45-615 was made as shown by the record in action for wages with the notification that if payment was not received within five days and suit was thereafter brought, attorney fees and penalty would be sought as provided in § 45-606 and upon action being thus brought, attorneys' fees in the amount of \$700 were stipulated and agreed upon. *O'Harrow v. Salmon River Uranium Dev., Inc.*, 84 Idaho 427, 373 P.2d 336 (1962).

Where the respondent's demand for salary was greater than the amount to which the



trial court found him to be lawfully entitled, the trial court erred in awarding attorney's fees. *Fish v. Fleishman*, 87 Idaho 126, 391 P.2d 344 (1964).

Where the wage earner's demand in writing far exceeded the amounts found by the trial court to be due and owing, the trial court did not err by failing to award attorney's fees. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978).

Where the amount of damages sought by

the employee is greater than the amount the trial court finds him to be lawfully entitled, the trial court could not award attorney fees under former § 45-615. *Neal v. Idaho Forest Indus., Inc.*, 107 Idaho 681, 691 P.2d 1296 (Ct. App. 1984).

No entitlement to attorney fees existed under this section where the wages awarded were less than the amount demanded. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

**45-616. Enforcement.** — (1) The director shall enforce and administer the provisions of this chapter. The director is empowered to hold hearings and otherwise investigate violations or alleged violations of this chapter and any rules promulgated pursuant thereto, and to issue orders for administrative remedies as authorized.

(2) The director is empowered to enter and inspect places, question employees, and investigate facts, conditions, or matters as the director may deem appropriate to determine whether any person has violated any provision of this chapter or any rule promulgated thereunder or which may aid in the enforcement of the provisions of this chapter.

(3) The director shall have the power to administer oaths and examine witnesses under oath or otherwise, and issue subpoenas to compel the attendance of witnesses and the production of any evidence deemed necessary in the administration of this chapter.

(4) If any person fails to comply with any subpoena lawfully issued, it shall be the duty of the district court, on application by the director, to compel compliance by citation for contempt.

(5) An employer shall furnish to the department the information the department is authorized to acquire under this section when the request is submitted in writing.

(6) The department shall attempt for a period of not less than two (2) years from the date of collection, to make payment of wages collected under this chapter to the person entitled thereto. Wage claims collected by the department that remain unclaimed for a period of more than two (2) years from the date collected shall on June 30th of each year be forfeited and retained in the department's account and used for the administration of this chapter. [I.C., § 45-613, as added by 1967, ch. 436, § 5, p. 1469; am. 1974, ch. 39, § 74, p. 1023; am. and redesign. 1989, ch. 280, § 17, p. 677; am. 1999, ch. 51, § 18, p. 115.]

**Compiler's notes.** This section was formerly compiled as § 45-613.

The amending clause of section 5 of S.L. 1967, ch. 436, read: "Section 5. That chapter 6 of title 44, Idaho Code, be, and the same is hereby amended by adding a new section thereto, following section 45-612, to be known and designated as section 45-613, and to read as follows." See Compiler's note under § 45-609.

The words "this act" refer to S.L. 1967, ch.

436, §§ 1-6 compiled as §§ 45-609 — 45-613 and 45-615.

Sections 73 and 75 of S.L. 1974, ch. 39 are compiled as §§ 45-608 and 45-617, respectively.

#### **Preliminary Determination of Work Relationship.**

In order to proceed with a wage collection, the Department of Labor and Industrial Services must determine whether wages are due and owing to the claimant; inherent in mak-

ing such a determination is the department's resolution of whether the parties maintained an employer/employee relationship, as such a relationship is a necessary subsidiary fact which must be established before the depart-

ment may proceed, and accordingly, the department is authorized to make that preliminary determination. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

**45-617. Administrative proceedings for wage claims.** — (1) Wage claims filed with the department, excluding potential penalties, are limited by the same dollar amount that limits actions before the small claims department of the magistrate's division of the district court.

(2) The contested case provisions of the Idaho administrative procedures act, chapter 52, title 67, Idaho Code, are inapplicable to proceedings involving wage claims under this chapter.

(3) Once a wage claim has been properly filed with the department, the provisions of this section shall provide the exclusive remedy for resolving the wage claim. If at any time after the filing of the wage claim the department determines that it lacks jurisdiction over the wage claim, the department shall provide written notification of its determination to the claimant and the employer. The claimant may then assert the wage claim in any court of competent jurisdiction. In the event the department determines that it lacks jurisdiction over the wage claim, the limitation periods provided for in section 45-614, Idaho Code, shall be tolled from the date the wage claim was filed with the department until the date notice that the department lacks jurisdiction is mailed to the claimant, as provided in subsection (5) of this section.

(4) A department compliance officer shall examine wage claims filed with the department and, on the basis of the facts found, shall determine whether the wage claimant is entitled to an award for unpaid wages and penalties. If the compliance officer is unable to determine whether wages and penalties are owed, the claim may be referred to a hearing officer for a determination. The department may adjust the amount of penalties awarded for an employer's failure to comply with the requirements of section 45-606, Idaho Code. The department may award no penalty, or may award a penalty in any amount up to the maximum amount allowed under section 45-607, Idaho Code. No penalty shall be awarded by the department unless a specific finding is made that wages were withheld willfully, arbitrarily and without just cause. The department's determination shall include findings of fact and conclusions of law. Before the determination becomes final or an appeal is filed, the compliance or hearing officer that issued the determination may, on their own motion, issue a revised determination. The determination or revised determination shall become a final determination unless, within fourteen (14) days after notice, as provided in subsection (5) of this section, an appeal is filed by the claimant or the employer with the department. If an appeal is not timely filed, the amount awarded by a final determination shall become immediately due and payable to the department. A final determination may be enforced by the department in accordance with section 45-618, Idaho Code.

(5) The claimant and the employer shall be entitled to prompt service of notice of determinations and decisions. A notice shall be deemed served if



delivered to the person being served or if mailed to his last known address. Service by mail shall be deemed complete on the date of mailing. The date indicated on department determinations or decisions as the "date of mailing" shall be presumed to be the date the document was deposited in the United States mail, unless otherwise shown by a preponderance of competent evidence.

(6) An appeal from a wage claim determination shall be in writing, signed by the appellant or the appellant's representative and shall contain words that, by fair interpretation, request the appeal process for a specific determination of the department. The appeal may be filed by personal delivery, by mail, or by fax to the wage and hour section of the department at the address indicated on the wage claim determination. The date of personal delivery shall be noted on the appeal and shall be deemed the date of filing. If mailed, the appeal shall be deemed to be filed on the date of mailing as determined by the postmark. A faxed appeal that is received by the wage and hour section by 5:00 p.m. on a business day shall be deemed filed on that date. A faxed appeal that is received by the wage and hour section on a weekend, holiday or after 5:00 p.m. on a business day shall be deemed filed on the next business day.

(7) To hear and decide appeals from determinations, the director shall appoint appeals examiners who have been specifically trained to hear wage claims. Unless the appeal is withdrawn, the appeals examiner shall affirm, modify, set aside or reverse the determination involved, after affording the claimant and the employer reasonable opportunity for a fair hearing, or may refer a matter back to the compliance or hearing officer for further action. The appeals examiner shall notify the claimant and the employer of his decision by serving notice in the same manner as provided in subsection (5) of this section. The decision shall set forth findings of fact and conclusions of law. The appeals examiner may, either upon application for rehearing by the claimant, the employer, or on his own motion, rehear, affirm, modify, set aside or reverse any prior decision on the basis of the evidence previously submitted or on the basis of additional evidence; provided, that such application or motion be made within ten (10) days after the date of service of the decision. A complete record shall be kept of all proceedings in connection with an appealed wage claim. All testimony at any hearing shall be recorded. Witnesses subpoenaed by the appeals examiner shall be allowed fees at a rate prescribed by the director. If the claimant or the employer formally requests the appeals examiner to issue a subpoena for a witness whose evidence is deemed necessary, the appeals examiner shall promptly issue the subpoena, unless such request is determined to be unreasonable. Unless the claimant or the employer, within fourteen (14) days after service of the decision of the appeals examiner, seeks judicial review pursuant to section 45-619, Idaho Code, or unless an application or motion is made for a rehearing of such decision, the decision of the appeals examiner shall become final and the amount awarded by the decision shall become immediately due and payable to the department. A decision that has become final may be enforced by the department according to section 45-618, Idaho Code.

(8) No person acting on behalf of the director shall participate in any case in which he has a direct or indirect personal interest.

(9)(a) Any right, fact, or matter in issue, directly based upon or necessarily involved in a determination or decision of the appeals examiner which has become final, shall be conclusive for all the purposes of this chapter as between the claimant and the employer who had notice of such determination or decision. Subject to judicial review as set forth in this chapter, any determination or decision shall be conclusive for all purposes of this chapter and shall not be subject to collateral attack irrespective of notice.

(b) No finding of fact or conclusion of law contained in a determination or decision rendered pursuant to this chapter by an appeals examiner, a court, or any other person authorized to make such determinations shall have preclusive effect in any other action or proceeding, except proceedings that are brought:

(i) Pursuant to this chapter;

(ii) To collect wage claims; or

(iii) To challenge the constitutionality of provisions of this chapter or administrative proceedings under this chapter. [I.C., § 45-617, as added by 1999, ch. 51, § 20, p. 115.]

**Compiler's notes.** Former § 45-617, which comprised I.C., § 45-617, as added by 1967, ch. 436, § 6, p. 1469; am. 1971, ch. 80, § 1, p. 177; am. 1974, ch. 39, § 75, p. 1023; am. 1977, ch. 141, § 1, p. 302; am. and redesi. 1989, ch. 280, § 18, p. 677; am. 1990, ch. 226, § 2, p. 603; am. 1996, ch. 421, § 37, p. 1406, was repealed by S.L. 1999, ch. 51, § 19, effective July 1, 1999.

#### ANALYSIS

Award beyond damages.

Cash value of insurance policy.

Commissions.

Exclusivity of remedies.

Grounds.

Independent contractors.

Payment for earned vacation.

Preliminary determination of work relationship.

Proof necessary.

Purpose.

Tender of wages.

Treble damages.

When action accrues.

Who may sue.

#### Award Beyond Damages.

When a statute allows an award beyond actual damages, the court must decide whether the award is intended to be a penalty or compensation. If it is intended to be a penalty, the statute's requirements must be strictly construed; if it is intended to be compensatory, the statutory requirements are not to be strictly construed. *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

#### Cash Value of Insurance Policy.

In action for breach of employment contract, it was error for the trial judge to treat the cash value of the life insurance policy as wages under subsection 4. of former § 45-617, where the proceeds of the policy were to be paid to the employee at retirement or to his heirs upon his death. The policy was a fixed benefit of employment status, and as such, it was not compensation earned in increments as services were performed, unlike wages, and also unlike compensation paid in direct consideration of services rendered, in amounts over and above an employee's regular paychecks. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

#### Commissions.

For the purpose of subsection 4. of former § 45-617 section, "wages" include commissions. *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984).

#### Exclusivity of Remedies.

Suit for treble damages under former § 45-617 section and suit for back wages along with 30 days additional wages under § 45-606 were mutually exclusive remedies. *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977).

The farm labor lien statute, § 45-301, provides a lien on the crop as security for the payment of any judgment awarded; former § 45-617, on the other hand, provided for the measure of damages to be awarded. Neither the language nor the titles of the separate acts suggested that the remedies under the acts were mutually exclusive; the two stat-



utes were intended to fulfill different purposes. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

Because of the exclusive nature of subsection 4. of former § 45-617, it could be utilized in situations where an employee voluntarily terminated his or her employment, even though § 45-606 was applicable only in situations where an employee is discharged. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

#### **Grounds.**

A request for attorney fees cannot be granted under § 12-120 when the underlying cause of action is a wage claim brought pursuant to this section. *Hutchison v. Anderson*, 130 Idaho 936, 950 P.2d 1275 (Ct. App. 1997).

#### **Independent Contractors.**

Contracts between co-counsel and the county established that they served as independent contractors doing work that was limited in scope and duration, and as such they were paid a fee for their services as opposed to wages. *Pena v. Minidoka County*, 133 Idaho 222, 984 P.2d 710 (1999).

#### **Payment for Earned Vacation.**

Payment for earned vacation was directly analogous to wages under subsection 4. of former § 45-617. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

#### **Preliminary Determination of Work Relationship.**

In order to proceed with a wage collection, the Department of Labor and Industrial Services must determine whether wages are due and owing to the claimant; inherent in making such a determination is the department's resolution of whether the parties maintained an employer/employee relationship, as such a relationship is a necessary subsidiary fact which must be established before the department may proceed, and accordingly, the department is authorized to make that preliminary determination. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 796 P.2d 155 (Ct. App. 1990).

#### **Proof Necessary.**

In order to recover treble damages, it need not be shown that an employer withholding wages acted with malice, wantonness, fraud or oppression, but it must be shown that the wages were wrongfully withheld. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978).

The liability of the employer for treble damages under subsection 4. of former § 45-617 was not dependent upon a finding that the employer "wrongfully" withheld the wages due; the employee only had to show that his wages were due and unpaid. *Smith v. Idaho*

*Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984).

#### **Purpose.**

The 1967 amendment to Idaho's claim for wages statutes was not intended to change the rule enunciated by previous cases which stopped the running of penalties upon a tender of the full amount of wages due. *Gano v. Air Idaho, Inc.*, 99 Idaho 720, 587 P.2d 1255 (1978).

#### **Tender of Wages.**

The treble damages penalty allowed by subsection 4. of former § 45-617 could not apply when a tender was made of the full amount of the wages due. *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984).

A tender of part of the wages ultimately found due should stop the running of the treble damages penalty as to the portion of the wages reflected by the tender, where such a partial tender is made unconditionally to the employee. Only if the tender is made in fact and rejected will the employer be protected from the invocation of the penalty statute. *Smith v. Idaho Peterbilt, Inc.*, 106 Idaho 846, 683 P.2d 882 (Ct. App. 1984).

A pre-complaint offer of wages to employees must take the form of an actual tender in order to escape liability by the employer for the treble damage penalty. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

#### **Treble Damages.**

In suit under former § 45-617 for wages wrongfully withheld treble damages must have been awarded whenever it was proved that the wages have been wrongfully withheld. *Goff v. H.J.H. Co.*, 95 Idaho 837, 521 P.2d 661 (1974).

Since the status of public officer cannot serve to exempt him from a duty to mitigate, while, at the same time, allowing him the benefits of a statute designed to protect wage earners who do have such a duty, an award of damages to a police chief who was wrongfully discharged could not be trebled under subsection 4. of former § 45-617. *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P.2d 136 (1979).

Where an employer was preparing to sell a division of his company within 60 days and promised his employee a bonus of 60 days' additional salary if the employee would remain with the company until the division was sold, such 60-day "pay bonus" was a wage, as defined in former § 45-609(3); thus, employer's refusal to pay such bonus subjected the employer to treble damages under subsection 4. of former § 45-617. *Neal v. Idaho Forest Indus., Inc.*, 107 Idaho 681, 691 P.2d 1296 (Ct. App. 1984).

To recover treble damages under subsection 4. of former § 45-617, a showing of wrongful-

ness was not required; neither was it necessary to show bad faith on the part of the employer. *Sage v. Richtron, Inc.*, 108 Idaho 837, 702 P.2d 875 (Ct. App. 1985).

Where the deputy sheriff was not entitled to salary as an incident of his right to his office, and his status was as "employee at will," he was entitled to recover treble damages under subsection 4. of former § 45-617. *Schoonover v. Bonner County*, 113 Idaho 916, 750 P.2d 95 (1988).

In action for breach of employment contract, there was no procedural error in the trial judge's decision to apply subsection 4 of former § 45-617, even though it was not pleaded by either party, nor was it otherwise raised as an issue at trial, where the complaint prayed for monetary relief from breach of an employment contract, and this was sufficient to place the employer on notice that unpaid wages, or items analogous to wages, could be awarded. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

In action for breach of employment contract, the employee was entitled to prejudgment interest only on the untrebled portion of the vacation pay due him because the additional amount produced by trebling became "due" only when judgment was entered. *Whitlock v. Haney Seed Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988).

The legislature did not intend the word "penalty," as used in § 45-611, to refer to the award of treble damages under subsection 4. of former § 45-617. *Barth v. Canyon County*, 128 Idaho 707, 918 P.2d 576 (1996).

A deferral account, the purpose of which

was to provide an executive employee with income even when the employer did not produce a pre-tax profit for the month, was not an agreement within the scope of ERISA and was subject to trebling under this section. *Bilow v. Preco, Inc.*, 132 Idaho 23, 966 P.2d 23 (1998).

#### **When Action Accrues.**

Where the school district could have compensated the employee for his overtime work any time during the term of his contract, it was not until that contract expired that his cause of action then accrued, for it is only then that he knew that he would not be compensated for the unpaid overtime. *Gilbert v. Moore*, 108 Idaho 165, 697 P.2d 1179 (1985).

#### **Who May Sue.**

This section allows any employee who has a claim for unpaid wages to bring suit in his own behalf in any court of competent jurisdiction, and if the claim is for under \$450.00 the employee may assign the claim to the Commissioner of Labor who will bring the suit in a representative capacity on behalf of the employee. *Rodwell v. Serendipity, Inc.*, 99 Idaho 894, 591 P.2d 141 (1979).

A wage earner need not proceed through the Department of Labor to trigger relief pursuant to subsection 4. of former § 45-617. *Schoonover v. Bonner County*, 113 Idaho 916, 750 P.2d 95 (1988).

Any employee, who for any reason has terminated his or her employment and who has had wages withheld, may utilize this section as a remedy. *Hales v. King*, 114 Idaho 916, 762 P.2d 829 (Ct. App. 1988).

**45-618. Administrative enforcement and collection of wage claims.** — (1) A department determination, if not appealed to an appeals examiner; or a decision of the appeals examiner, if judicial review is not sought; or a court order following judicial review, may be enforced by the department according to section 45-620, Idaho Code.

(2) If at any time the department determines, in its sole discretion, that a wage claim upon which a lien was filed pursuant to section 45-620, Idaho Code, is no longer collectable, the department shall:

(a) Transfer the state lien from the central lien filing system of the secretary of state to the district court in the county of the debtor's last known address. A lien transferred pursuant to this subsection shall be entered in the judgment docket of the district court and recorded as a transferred lien with the effective date of the lien being the date it was initially filed with the secretary of state.

(b) Notify the claimant in writing, at the claimant's last known address, that the lien has been transferred and advise the claimant that no further action will be maintained by the department on the wage claim, and that from the date of the transfer, it shall be the claimant's sole responsibility to maintain and enforce the lien.



(3) A lien transferred pursuant to this section shall be enforceable by the claimant in the same manner and with the same effect as if the lien had been a judgment of the district court. [I.C., § 45-618, as added by 1999, ch. 51, § 21, p. 115.]

**45-619. Judicial review.** — (1) A claimant or employer aggrieved by a final decision of the appeals examiner may obtain judicial review of the decision pursuant to the provisions of chapter 52, title 67, Idaho Code, and the provisions of this section.

(2) If the employer files a petition for judicial review in a court of competent jurisdiction contesting the appeals examiner's decision, the employer, not later than the twenty-eighth day after the date the appeals examiner's decision became final, shall either:

(a) Deposit the full amount awarded to the claimant with the department, to be placed by the department in an interest-bearing escrow account of a fully insured financial institution; or

(b) Post a bond, written by a fidelity, surety, guaranty, title or trust company authorized to do business in the state of Idaho. The bond must be in the full amount of the appeals examiner's decision and shall state that the company issuing or executing the bond agrees to pay to the department on behalf of the employer all sums found to be due and owing by the employer by reason of the outcome of the appeal, within thirty (30) days of the filing of the court's decision. A copy of the bond shall be served upon the department and the claimant; or

(c) File an affidavit of inability to either post a bond or send to the department the amount awarded to the claimant.

(3) The employer's failure to timely post a bond or send the amount required by subsection (2) of this section shall constitute a waiver of the right to judicial review.

(4) If, after judicial review, it is determined that some or all of the wages are not owed or the penalty is reduced or is not assessed, the department shall remit the appropriate amount to the employer, plus the interest accrued on the escrowed amount, or collect from the bond only the amount awarded by the court on appeal, up to the maximum amount of the bond. [I.C., § 45-619, as added by 1999, ch. 51, § 22, p. 115.]

**Sec. to sec. ref.** This section is referred to in § 45-617.

**45-620. Liens.** — (1) Upon the failure of any person to pay any amount when due pursuant to section 45-617, Idaho Code, the department may file with the office of the secretary of state, as provided in chapter 19, title 45, Idaho Code, a notice of lien.

(2) Upon delivery to the secretary of state, the notice of lien shall be filed and maintained in accordance with chapter 19, title 45, Idaho Code. When such notice is duly filed, all amounts due shall constitute a lien upon the entire interest, legal or equitable, in any property of such person, real or personal, tangible or intangible, not exempt from execution, situated in the state. Such lien may be enforced by the director or by any sheriff of the

various counties in the same manner as a judgment of the district court duly docketed and the amount secured by the lien shall bear interest at the rate of the state statutory legal limit on judgments. The foregoing remedy shall be in addition to all other remedies provided by law.

(3) In any suit or action involving the title to real or personal property against which the state has a perfected lien, the state shall be made a party to such suit or action. [I.C., § 45-620, as added by 1999, ch. 51, § 23, p. 115.]

Sec. to sec. ref. This section is referred to in §§ 45-607 and 45-618.

**45-621. Collection of lien amounts.** — (1) In addition to all other remedies or actions provided by this chapter, it shall be lawful for the director or his agent to collect any amounts secured by liens created pursuant to this chapter by seizure and sale of the property of any person liable for such amounts who fails to pay the same within thirty (30) days from the mailing of notice and demand for payment thereof.

(2) Property exempt from seizure shall be the same property that is exempt from execution as otherwise allowed by law.

(3) In exercising his authority under subsection (1) of this section, the director may levy, or by his warrant, authorize any of his representatives, a sheriff or deputy to levy upon, seize and sell any nonexempt property belonging to any person liable for the amounts secured by the lien.

(4) When a warrant is issued by the department for the collection of any amount due pursuant to a lien authorized by this chapter, it shall be directed to any authorized representative of the department, or to any sheriff or deputy, and any such warrant shall have the same force and effect as a writ of execution. It may be levied and sale made pursuant to it in the same manner and with the same force and effect as a levy and sale pursuant to a writ of execution. Upon the completion of his services pursuant to said warrant, the sheriff or deputy shall receive the same fees and expenses as are provided by law for services related to a writ of execution. All such fees and expenses shall be an obligation of the person liable for the amounts due and shall be collected from such person by virtue of the warrant. Any warrant issued by the director shall contain, at a minimum, the name and address of the liable person; the nature of the underlying liability; the date the liability was incurred; the amount of the liability secured by the lien; the amount of any penalty, interest or other amount due under the lien; and the interest rate on the lien.

(5) Whenever any property that is seized and sold by virtue of the foregoing provisions is not sufficient to satisfy the claim of the state for which seizure is made, any other property subject to seizure shall be seized and sold until the amount due from such person, together with all expenses, is fully paid.

(6) All persons are required, on demand of a representative of the department, a sheriff or deputy acting pursuant to this chapter, to produce all documentary evidence and statements relating to the property or rights in the property subject to seizure.



(7) Upon the filing of a state lien pursuant to section 45-620, Idaho Code, the department may collect on the lien in the same manner and to the same extent as the department collects tax liabilities and overpayment of benefits as provided by section 63-3077A, Idaho Code. [I.C., § 45-621, as added by 1999, ch. 51, § 24, p. 115.]

**Compiler's notes.** Section 25 of S.L. 1999, ch. 51, is compiled as § 45-1901.

## CHAPTER 7

### HOSPITAL AND NURSING CARE LIENS

#### SECTION.

45-701. Right to lien conferred.

45-702. Perfecting lien — Statement of claim  
— Contents — Filing.

45-703. Recording and indexing lien.

45-704. Release of lien — Action to enforce  
lien.

#### SECTION.

45-704A. Liens for nursing care.

45-704B. Liens for medical care.

45-705. Workmen's compensation cases ex-  
cepted from act.

**45-701. Right to lien conferred.** — Every individual, partnership, firm, association, corporation, institution or any governmental unit or combination or parts thereof maintaining and operating a hospital in this state shall be entitled to a lien for the reasonable charges for hospital care, treatment and maintenance of an injured person upon any and all causes of action, suits, claims, counterclaims, or demands accruing to the person to whom such care, treatment, or maintenance was furnished, or to the legal representatives of such person, on account of injuries giving rise to such causes of action and which necessitated such hospital care, treatment and maintenance. [1941, ch. 118, § 1, p. 238.]

#### **Lien Not Barred by Res Judicata.**

Where the district court dismissed a hospital's claim against a patient, who lived outside the state and was injured outside the state, for lack of in personam jurisdiction, there was no final adjudication on the merits, thus the hospital's lien foreclosure claim against the patient was not barred by the doctrine of res judicata. Saint Alphonsus Re-

gional Medical Ctr. v. Bannon, 128 Idaho 41, 910 P.2d 155 (1995).

**Collateral References.** 41 C.J.S., Hospitals, § 15.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries. 16 A.L.R.5th 262.

**45-702. Perfecting lien — Statement of claim — Contents — Filing.** — In order to perfect such lien, an officer or agent of such hospital, before, or within ninety (90) days after, such person shall have been discharged therefrom, shall file in the office of the recorder of the county in which such hospital shall be located a verified statement in writing setting forth the name and address of such patient, as it shall appear on the records of such hospital, the name and location of such hospital, and the name and address of the officer or agent of such hospital filing the lien, the dates of admission to and discharge of such patient therefrom, the amount claimed to be due for such hospital care, and, to the best of claimant's knowledge, the names and addresses of all persons, firms, or corporations claimed by such injured person or the legal representative of such person, to be liable for

damages arising from such injuries; such claimant shall also, within one (1) day after the filing of such claim or lien, mail a copy thereof, postage prepaid, to each person, firm, or corporation so claimed to be liable for such damages, at the address so given in such statement. The filing of such claim or lien shall be notice thereof to all persons, firms or corporations liable for such damages, whether or not they are named in such claim or lien. [1941, ch. 118, § 2, p. 238; am. 1967, ch. 65, § 1, p. 147.]

**Sec. to sec. ref.** This section is referred to in §§ 45-704A and 45-704B.

Alphonsus Reg'l Med. Ctr., 136 Idaho 238, 31 P.3d 926 (Ct. App. 2001).

**Cited in:** Kenneth F. White, Chtd. v. St.

**45-703. Recording and indexing lien.** — The recorder shall endorse thereon the date and hour of recording and, at the expense of the county, shall provide a hospital lien book with proper index in which he shall enter the date and hour of such recording, the name and address of such hospital and of such patient, the amount claimed and the names and addresses of those claimed to be liable for damage. Such recorder shall be paid the sum as provided by section 31-3205, Idaho Code. [1941, ch. 118, § 3, p. 238; am. 1984, ch. 30, § 1, p. 51.]

**Sec. to sec. ref.** This section is referred to in §§ 45-704A and 45-704B.

**45-704. Release of lien — Action to enforce lien.** — No release of such causes of action, or any of them, or of any judgment thereon, shall be valid or effectual as against such lien unless such lienholder shall join therein, or execute a release of such lien, and the claimant, or assignee of such lien may enforce such lien by an action against the person, firm or corporation liable for such damage, which action shall be commenced and tried in the county in which such lien shall be filed, unless ordered removed to another county by the court for cause. If the claimant shall prevail in such action, the court may allow reasonable attorney's fees and disbursements. Such action shall be commenced within two (2) years after the filing of such lien. [1941, ch. 118, § 4, p. 238.]

**Sec. to sec. ref.** This section is referred to in § 45-704B.

(1995); Kenneth F. White, Chtd. v. St. Alphonsus Reg'l Med. Ctr., 136 Idaho 238, 31 P.3d 926 (Ct. App. 2001).

**Cited in:** Saint Alphonsus Regional Medical Ctr. v. Bannon, 128 Idaho 41, 910 P.2d 155

**45-704A. Liens for nursing care.** — Every person licensed under the laws of the state of Idaho to render nursing care shall be entitled to a lien for the reasonable charges for nursing care and treatment rendered an injured person upon any and all causes of action, suits, claims, counter-claims, or demands accruing to the person to whom such care and treatment was furnished, or to the legal representatives of such person, on account of injuries giving rise to such causes of action and which necessitate such nursing care and treatment; said lien shall be perfected in the form and manner as provided in section 45-702, Idaho Code; said lien shall be recorded and indexed in the manner provided in section 45-703, Idaho Code;



said lien shall be enforced and/or released in the manner provided in section 45-704, Idaho Code; and if the claimant of said lien shall prevail in an action to enforce said lien, the court may allow reasonable attorney's fees and disbursements. [I. C., § 45-704A, as added by 1961, ch. 21, § 1, p. 23.]

**Compiler's notes.** Section 2 of S.L. 1961, ch. 21 declared an emergency. Approved February 7, 1961.

**45-704B. Liens for medical care.** — Every individual or association licensed or incorporated under the laws of the state of Idaho to practice medicine and surgery (hereinafter "physician") shall be entitled to a lien for the reasonable charges for medical care and treatment rendered an injured person upon any and all causes of action, suits, claims, counterclaims, or demands accruing to the person to whom such care and treatment was furnished, or to the legal representatives of such person, on account of injuries giving rise to such causes of action and which necessitate such medical care and treatment. In order to perfect the lien, the physician or his agent shall, before or within ninety (90) days after the last date of medical services for the injury, file the lien in the same general form and manner as provided in section 45-702, Idaho Code, in the office of the recorder of the county in which the physician rendered the services. The lien shall be recorded and indexed in the manner provided in section 45-703, Idaho Code. The lien shall be enforced and/or released in the manner provided in section 45-704, Idaho Code. If the claimant of the lien shall prevail in an action to enforce the lien, the court may allow reasonable attorney's fees and disbursements. [I.C., § 45-704B, as added by 1979, ch. 302, § 1, p. 822.]

**Compiler's notes.** The words in parentheses so appeared in the law as enacted.

**45-705. Workmen's compensation cases excepted from act.** — The provisions of this act shall not be applicable to accidents or injuries within the purview of the Workmen's Compensation Law of this state. [1941, ch. 118, § 5, p. 238.]

**Compiler's notes.** The words "this act" refer to S.L. 1941, ch. 118 compiled as §§ 45-701 — 45-705.

Section 6 of S.L. 1941, ch. 118 declared an emergency. Approved March 10, 1941.

**Cross ref.** Workers' Compensation, §§ 72-101 et seq.

#### **Lien Waivers.**

In action involving contract dispute which arose from a remodeling project that plaintiffs performed on residential property for defendants, lien waiver signed by plaintiffs and

defendants did not hold defendants harmless from claims of subcontractors where remodeling project differed from other projects performed by plaintiffs for defendant in that in this project plaintiffs did not control or direct the subcontractors as they had in the past and defendants dealt directly with the subcontractors in that they paid several of these contractors directly and directed their work. *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct. App. 1997).

## CHAPTER 8

## MISCELLANEOUS LIENS

## SECTION.

- 45-801. Vendor's lien.
- 45-802. Vendor's lien — Waiver.
- 45-803. Vendor's lien — Extent.
- 45-804. Lien of purchaser of real property.
- 45-805. Liens for services on or caring for property.
- 45-806. Lien for making, altering, or repairing personal property.

## SECTION.

- 45-807. Lien of factor.
- 45-808. Lien of banker.
- 45-809. Lien for cooperative corporations or associations.
- 45-810. Homeowner's association liens.

**45-801. Vendor's lien.** — One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. [R.S., § 3440; reen. R.C. & C.L., § 3441; C.S., § 6408; I. C.A., § 44-701.]

**Cross ref.** Animals, lien for care of neglected animals, § 25-3511; of tortured animals, § 25-3505.

Attorney's lien, § 3-205.

Carey Act liens, § 42-2203 et seq.

Estrays, liens on, § 25-2301 et seq.

Forestry protection, lien for costs, §§ 38-112, 38-113.

Future interest, lien on, § 45-107.

Hotels, property held for charges, §§ 55-1401 — 55-1404.

Inheritance tax liens, § 14-401 et seq.

Judgment liens, §§ 5-513, 10-1110.

Mining partnership property, liens on, § 53-404.

Taxes as liens, tit. 63.

Water contracts on Carey Act lands, lien for, §§ 42-2026 — 42-2028.

## ANALYSIS

- Assignment of interest.
- Attorney's fees.
- Conditional sale contract.
- Deficiency judgment.
- Equitable title.
- Failure of consideration.
- Nature of lien.
- Protections available.
- Relief to buyer.
- Waiver of lien.

**Assignment of Interest.**

Purchasers under real estate sales contract never held legal title to the property but only an equitable interest as purchasers; they retained no interest in the property when they assigned their interest in the contract to the debtors, and they did not have a vendor's lien under the provisions of this section. In re Krueger, 127 Bankr. 252 (Bankr. D. Idaho 1991).

**Attorney's Fees.**

Attorney's fees are not a cost chargeable in foreclosing vendor's lien. *Farnsworth v. Pepper*, 27 Idaho 154, 148 P. 48 (1915).

**Conditional Sale Contract.**

Vendors did not, at the time of securing an attachment, have a vendor's lien on the property described in the contract; they did not part with title to property sold, hence no vendor's lien is involved. *Heinrich v. Barlow*, 87 Idaho 72, 390 P.2d 831 (1964).

**Deficiency Judgment.**

Seller of interest in mining claims who retained title to secure payment of purchase price could foreclose vendor's lien upon default of purchaser and recover judgment for deficiency if property did not sell for enough to pay amount of debt. *Ferguson v. Blood*, 152 F. 98 (9th Cir. 1907).

Deficiency judgment may be entered in accordance with § 6-101, when the property is insufficient to satisfy claim. *Farnsworth v. Pepper*, 27 Idaho 154, 148 P. 48 (1915).

**Equitable Title.**

Equitable title will support vendor's lien. *Farnsworth v. Pepper*, 27 Idaho 154, 148 P. 48 (1915).

**Failure of Consideration.**

A seller who, through no fault of his own, remains unpaid because the consideration promised is not delivered has a vendor's lien on the property regardless of the nature of the promised consideration or collateral. *Blankenship v. Myers*, 97 Idaho 356, 544 P.2d 314 (1975).

A deed to a parcel of land cannot be considered payment for other property unless it is accepted by the seller as a representation of the parcel of land and not merely a physical



possession. *Blankenship v. Myers*, 97 Idaho 356, 544 P.2d 314 (1975).

#### **Nature of Lien.**

Vendor's lien recognized in bankruptcy court. In *re Lane Lumber Co.*, 210 F. 82 (D. Idaho 1913), *aff'd*, 217 F. 550 (1914).

Vendor's lien is incident of sale unless vendor's intention that it shall not exist is clearly shown. *Rogers v. Crockett*, 41 Idaho 336, 238 P. 894 (1925).

A vendor's lien is not a specific and absolute charge on the realty but a mere equitable charge to resort to it, i.e., the property, on failure of payment by the vendee; thus, even if a judgment debtor did possess a vendor's lien in certain property he sold, he possessed no interest in the property which could be levied upon pursuant to § 8-539 by the judgment creditor. *Estates of Somers v. Clearwater Power Co.*, 107 Idaho 29, 684 P.2d 1006 (1984).

A vendor's lien, like a mortgage, is a security device, but unlike a mortgage, which arises from agreement of the parties, a vendor's lien arises by operation of law, unless waived. *Quintana v. Anthony*, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

#### **Protections Available.**

The legislative policies underlying the mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien. Therefore, protections paralleling those given mortgagors are appropriate, and may be provided in equity, where sellers of real property assert the existence of vendors' liens. *Quintana v. Anthony*, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

#### **Relief to Buyer.**

Where parties' stipulation explicitly denominated foreclosure of vendor's lien as the remedy for untimely performance of stipulated covenants, buyer was entitled to relief from any injustice shown to result from deferring a foreclosure sale of the ranch encumbered with the vendor's lien while other property was sold at execution. *Quintana v. Anthony*, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

#### **Waiver of Lien.**

Where person sells real estate to married man and conveys same by good and sufficient

deed, and takes as part of purchase price promissory notes executed by vendee and vendee's wife, the signature of wife to such notes does not constitute such security as will amount to a waiver of vendor's lien. *Smith v. Schultz*, 23 Idaho 144, 129 P. 640 (1912).

Waiver of vendor's lien induced by fraud of vendee will not be implied. *Rogers v. Crockett*, 41 Idaho 336, 238 P. 894 (1925).

A party with a vendor's lien does not waive the right to that lien by seeking an attachment of the property; however, an attachment would not be valid and any rights to the property would be determined by the existing security interest. *Blankenship v. Myers*, 97 Idaho 356, 544 P.2d 314 (1975).

**Collateral References.** 92 C.J.S., Vendor & Purchaser, § 529 et seq.

Use of a vendor's lien to secure a legacy which one receiving a quitclaim from a legatee agrees to pay. 2 A.L.R. 810.

Tender of the deed as a condition precedent to suit to foreclose a vendor's lien. 35 A.L.R. 127.

Remedy of a holder of a lien on real property against a third person for damage to or trespass on the property. 37 A.L.R. 1120.

Conveyance in consideration of support as creating a lien or charge upon the land conveyed. 64 A.L.R. 1250.

Right to enforce vendor's lien against property purchased by municipality. 76 A.L.R. 695.

Vendor's lien against realty in the combined sale of personalty and realty. 88 A.L.R. 92.

Different classes of vendors' liens. 91 A.L.R. 148.

Nonresidence or absence of a defendant from the state as suspending the running of limitations against an action to enforce vendor's lien. 119 A.L.R. 331.

Rule as to sale of land in the inverse order of alienation on the enforcement of a vendor's lien. 131 A.L.R. 4.

Deed from purchaser to vendor as a merger of a vendor's lien as regards intervening liens. 148 A.L.R. 816.

Construction of provision in real estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made. 41 A.L.R.3d 7.

Marketability of title as affected by lien discharged only out of funds to be received from purchaser at closing. 55 A.L.R.3d 678.

**45-802. Vendor's lien — Waiver.** — Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract, but a transfer of such contract, in trust to pay debts, and return the surplus, is not a waiver of the lien. [R.S., § 3441; *reen*. R.C. & C.L., § 3442; C.S., § 6409; I.C.A., § 44-702.]

**Collateral References.** Release of a vendee as indorser of a note as a waiver of the vendor's lien. 1 A.L.R. 1638.

Notice of lien to purchaser from or through

a bona fide purchaser as affecting the former's right to protection from the lien. 63 A.L.R. 1362.

**45-803. Vendor's lien — Extent.** — The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value. [R.S., § 3442; reen. R.C. & C.L., § 3443; C.S., § 6410; I.C.A., § 44-703.]

**Cited in:** Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975).

**Purchaser or Encumbrancer.**

Vendor's lien is enforceable against trustee in bankruptcy, who is not a purchaser or encumbrancer under this section. Creditor holding a lien by legal or equitable proceedings is not a purchaser or encumbrancer in good faith and for value. In re Lane Lumber Co., 210 F. 82 (D. Idaho 1913), aff'd, 217 F. 550 (1914).

**Collateral References.** 92 C.J.S., Vendor & Purchaser, § 550 et seq.

Right of buyer of chattels to lien upon the property where he rescinds the contract. 7 A.L.R. 993; 21 A.L.R.2d 380.

Priority between purchaser of notes given

under a contract for the sale of land and mortgagee or grantee from a vendor. 35 A.L.R. 28.

Marketability of a title as affected by a vendor's lien. 57 A.L.R. 1253.

Priority between holders of different notes or obligations secured by the same vendor's lien. 115 A.L.R. 40.

Sale of standing timber as affecting vendor's lien upon the land. 122 A.L.R. 517.

Redemption rights of vendee defaulting under executing land sale contract after foreclosure sale or foreclosure decree enforcing vendor's lien or rights. 51 A.L.R.2d 672.

Priority as between vendor's lien and mortgage or deed of trust to third person furnishing purchase money. 55 A.L.R.2d 1119.

**45-804. Lien of purchaser of real property.** — One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration. [R.S., § 3444; reen. R.C. & C.L., § 3445; C.S., § 6411; I.C.A., § 44-704.]

**ANALYSIS**

Agreement for sale necessary.

Need for possession.

Subsequent sale and mortgage.

**Agreement for Sale Necessary.**

This section was never intended to authorize a vendee's lien in a case where there was no "agreement for sale" of the property. Shepherd v. Dougan, 58 Idaho 543, 76 P.2d 442 (1938).

**Need for Possession.**

This statutory lien exists independent of possession and it is not necessary to retain possession in order to protect lien. Wilson v. Sunnyside Orchard Co., 33 Idaho 501, 196 P. 302 (1921).

Buyer's suit for rescission and refund of instalment payments on the ground of false representation as to boundaries by seller was not barred where they remained in possession, if they offered to give land back and tendered quitclaim deed, since possession was

retained as security for repayment of instalment payments. Brooks v. Jensen, 75 Idaho 201, 270 P.2d 425 (1954).

Buyer who made a down payment was not justified in retaining possession of property for several months in order to protect her security, since this section gives a lien to purchaser for amount of down payment independent of possession. Graves v. Cupic, 75 Idaho 451, 272 P.2d 1020 (1954).

**Subsequent Sale and Mortgage.**

Where purchaser properly rescinded real estate sale contract, he had a lien for return of purchase money paid in and value of improvements, and this lien was superior to sale and mortgage made after notice of pendency of a suit to declare and foreclose the lien. McMahon v. Cooper, 70 Idaho 139, 212 P.2d 657 (1949).

**Collateral References.** 53 C.J.S., Liens, § 11.

Right of widow of purchaser to exoneration of property from vendor's lien. 66 A.L.R. 75.



Right of vendee under executory land contract to lien for amount paid on purchase price. 33 A.L.R.2d 1384; 82 A.L.R.3d 1040.

Right of seller or assignor of leasehold to vendor's lien. 67 A.L.R.2d 1094.

Right of vendee under executory land contract to lien for amount paid on purchase price as against subsequent creditors of or purchasers from vendor. 82 A.L.R.3d 1040.

**45-805. Liens for services on or caring for property.** — (a) Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor, or skill, employed for the protection, improvement, safe keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner, for such service. If the liens as herein provided are not paid within sixty (60) days after the work is done, service rendered or materials supplied, the person in whose favor such special lien is created may proceed to sell the property at a public auction after giving ten (10) days' public notice of the sale by advertising in some newspaper published in the county where the property is situated, or if there is no newspaper published in the county then by posting notices of the sale in three (3) of the most public places in the county for ten (10) days previous to such sale. The person shall also send the notice of auction to the owner or owners of the property and to the holder or holders of a perfected security interest in the property as provided in subsection (c) of this section. The person who is about to render any service to the owner of an article of personal property by labor or skill employed for the protection, improvement, safekeeping or carriage thereof may take priority over a prior perfected security interest by, before commencing any such service, giving notice of the intention to render such service to any holder of a prior perfected security interest at least three (3) days before rendering such service. If the holder of the security interest does not notify said person, within three (3) days that it does not consent to the performance of such services, then the person rendering such service may proceed and the lien provided for herein shall attach to the property as a superior lien. The provisions of this section shall not apply to a motor vehicle subject to the provisions of sections 49-1809 through 49-1818, Idaho Code.

(b) Livery or boarding or feed stable proprietors, and persons pasturing livestock of any kind, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding or pasturing such livestock. If the liens as herein provided are not paid within sixty (60) days after the work is done, service rendered, or feed or pasturing supplied, the person in whose favor such special lien is created may proceed to sell the property at a licensed public livestock auction market, after giving ten (10) days' notice to the owner or owners of the livestock and the state brand inspector. The information contained in such notice shall be verified and contain the following:

- (1) The time, place and date of the licensed public livestock auction market;
- (2) The name, address and phone number of the person claiming the lien;
- (3) The name, address and phone number of the owner or owners of the livestock upon which the lien has been placed;

(4) The number, breed and current brand of the livestock upon which the lien has been placed; and

(5) A statement by the lienor that the requirements of this section have been met.

(c) Notices provided in subsections (a) and (b) of this section shall be made by personal service or by certified or registered mail to the last known address of the owner or owners and any holder of a prior perfected security interest. The proceeds of the sale must be applied to the discharge of any prior perfected security interest, the lien created by this section and costs; the remainder, if any, must be paid over to the owner. [R.S., § 3445; am. 1893, p. 67, § 1; reen. 1899, p. 181, § 1; reen. R.C. & C.L., § 3446; C.S., § 6412; I.C.A., § 44-705; am. 1982, ch. 262, § 1, p. 673; am. 1990, ch. 236, § 1, p. 672.]

**Compiler's notes.** Section 2 of S.L. 1990, ch. 236 declared an emergency. Approved April 5, 1990.

**Cited in:** *Folen v. Saxton*, 31 Idaho 319, 171 P. 669 (1918); *State v. O'Bryan* (1975), 96 Idaho 548, 531 P.2d 1193; *Pine Creek Ranches, Inc. v. Higley*, 101 Idaho 326, 612 P.2d 1173 (1980).

#### ANALYSIS

Agister's lien.

Application.

Attorney's fees.

Constitutionality.

—State action.

Distinguished from UCC.

Foreclosure of agister's lien.

Liberal construction.

Loss of lien.

Possession.

Premature foreclosure.

Priority of agister's lien.

Sale of property.

—Subsequent tort action.

Warehouseman's liens.

Watchmen.

#### Agister's Lien.

Agister's lien is strictly statutory, no such lien existing at common law. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

The only logical construction of this section is that its purpose is to protect all persons caring for and feeding livestock of others for reasonable and agreed compensation for such services. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

It makes no difference whether compensation is at certain rate per day or month or what basis is agreed upon, so long as payment is to be made under some standard of compensation. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Act of the owner of cattle in giving agister check for amount claimed for pasturing of

cattle, thereby inducing him to release his lien under this section and permit the removal of the cattle, terminated the contract between the parties, waived any breaches thereof, and reached an accord and satisfaction with the agister as to the amount due and upon stopping payment on the check was liable to the agister for the amount thereof. *Copenhaver v. Lavin*, 92 Idaho 681, 448 P.2d 774 (1968).

#### Application.

Party placed in charge of mining property consisting of both personal and real estate has a lien on the personal property for value of his services so long as he remains in possession. *Idaho Comstock Min. & Milling Co. v. Lundstrum*, 9 Idaho 257, 74 P. 975 (1903).

Where two or three tenants in common in possession of personal property employ another to care for and protect property, latter is entitled to a lien dependent on possession for his pay for his services in caring for the same, but is not entitled to lien on real property for the care and protection of either the real estate or the personal property. *Williamson v. Moore*, 10 Idaho 749, 80 P. 227 (1905).

This section has no application to property in the custody of the law. *Beck v. Lavin*, 15 Idaho 363, 97 P. 1028 (1908).

This section applies to cases where party takes possession of personal property, such, for example, as livestock, and agrees to graze, feed or pasture stock for a period of time and assumes exclusive care of and responsibility for property, and furnishes or procures feed or pasture therefor, whether it be from his private inclosure or on the public domain. *Mendilie v. Snell*, 22 Idaho 663, 127 P. 550, 43 L.R.A. (n.s.) 731 (1912).

Person furnishing gasoline and nonfreezing mixture for truck is not entitled to lien for value thereof under this section or § 45-806. *Neitzel v. Lawrence*, 40 Idaho 26, 231 P. 423 (1924).



**Attorney's Fees.**

Attorney's fees are not recoverable under this section. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

An improper inclusion of attorney's fees in a claim and in making the sale does not invalidate a proceeding or make the lien claimant guilty of conversion. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

**Constitutionality.**

Where plaintiff has demonstrated no actual prejudice flowing from any perceived inadequacy in the notice mandated by this section, plaintiff could not argue that this section is constitutionally infirm because it denies due process, as unless an individual has been adversely affected by a statute he or she will not be heard to argue that the statute is constitutionally deficient because it lacks due process guarantees. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

**—State Action.**

The lien sale procedure authorized by this section is a self-help remedy, and such a remedy will not constitute state action. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

**Distinguished from UCC.**

This section applies to a wide range of service providers, ranging from sophisticated businesses to shoe repair shops and laundries, and the legislature has not seen fit to impose upon such service providers the same burdens Article 9 places on secured parties under the UCC; neither has the legislature determined that service providers must, in effect, sell or buy property at full market value in order to collect the debts owed to them. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

**Foreclosure of Agister's Lien.**

In action to foreclose agister's lien there is no misjoinder of parties in including original owner and his vendee with one holding chattel mortgage on property. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Agreement with agisters to continue feeding cattle and adding others to original number has effect of continuing lien, and action may be brought within six months from time cattle are taken. *Smeed v. Stockmen's Loan Co.*, 48 Idaho 643, 284 P. 559 (1930).

**Liberal Construction.**

This section will be liberally construed in favor of the workmen. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

**Loss of Lien.**

Lien is not lost where property is taken from possession of lienholder by force or

fraud. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

As a general rule, common law or statutory lien dependent upon possession is waived or lost by lienholder voluntarily and unconditionally parting with possession or control of property to which it attaches; but not where there is intention to preserve lien and lienholder parts with possession only conditionally. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Waiver of lien cannot be predicated on contract whereby parties agreed to sale of cattle and temporary disposition of money pending determination of their claims. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

Where property is delivered to person under single contract and part is voluntarily returned without payment, lienor will retain his lien on part remaining in his possession for whole amount due under contract. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

**Possession.**

Right to lien under this section depends wholly upon possession of property by claimant. *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204 (1912).

Possession necessary to entitle party to a lien must be such as to give party for time being the exclusive care, control and direction of property, which must be more than that of a mere servant for hire from day to day or month to month who is subject to direction and orders of the master. *Mendilie v. Snell*, 22 Idaho 663, 127 P. 550, 43 L.R.A. (n.s.) 731 (1912).

If, in connection with closing a sale, papers are put into broker's hands incidentally, and only to have him examine mortgage and abstract, he is not entitled to a lien upon them for any commission which might be due from plaintiff to him in negotiating sale of said property. *Smith v. Bergstresser*, 26 Idaho 322, 143 P. 402 (1914).

**Premature Foreclosure.**

A lien is not prematurely foreclosed because sixty days had not elapsed between the time the work was done, or services rendered, and the foreclosure, nor because a watchman remained in charge of the property after making demand for payment. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

**Priority of Agister's Lien.**

Agister's lien entered into prior to execution of chattel mortgage on property involved is prior to and superior to lien of such chattel mortgage. *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926).

**Sale of Property.**

This section contains no requirement that a lienholder make a payment based on the

property's full market value; it allows a lienholder to conduct a sale at which it may bid the amount claimed for services rendered, plus sale costs, and if the property is sold for a sum greater than the debt (including costs) secured by the lien, the lienholder must tender the excess proceeds to the property owner. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

#### —Subsequent Tort Action.

It would be palpably unfair, and would undermine the remedial purpose of lien statutes if a debtor could stand silent, allowing a sale to occur without objection, and then obtain tort damages in a subsequent lawsuit if the debt were ultimately found to have an offset; the law does not, and should not, countenance such a retroactive tort. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

Where a boatowner, having been notified of a debt regarding moorage services and of an impending sale of his boat to satisfy the debt, could have asserted its offset before the sale occurred, but instead, elected to remain silent, in this circumstance the sale of the boat cannot be deemed a conversion. *Comstock Inv. Corp. v. Kaniksu Resort*, 117 Idaho 990, 793 P.2d 222 (Ct. App. 1990).

#### Warehouseman's Liens.

This section, so far as it relates to warehouse liens, was repealed by the enactment of

§ 28-7-209, because this section is not listed in § 28-10-102(1) as one of the statutes specifically repealed by the UCC, and this section is inconsistent with § 28-7-209, and the exception to repeal by implication contained in § 28-10-104(1) does not apply to the repeal of this section so far as it relates to warehouse liens. *Curry Grain Storage, Inc. v. Hesston Corp.*, 120 Idaho 328, 815 P.2d 1068 (1991).

#### Watchmen.

A watchman of property has sufficient possession to entitle him to assert the lien provided for by this section. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

A watchman in charge of property who is entitled to a lien may claim the benefits thereof where he is discharged and remains on the property up to the time of the sale. *Seafoam Mines Corp. v. Vaughn*, 56 Idaho 342, 53 P.2d 1166 (1936).

**Collateral References.** Attorneys' liens on a decedent's estate. 50 A.L.R. 657.

Priority of a statutory lien on an automobile for storage, as against rights of purchasers, attaching creditors, or trustee in bankruptcy, which arose while the car was in possession of the owner after accrual of storage charges. 100 A.L.R. 80.

Forwarder, lien of. 141 A.L.R. 919.

Lien for storage of an automobile. 48 A.L.R.2d 894; 85 A.L.R.3d 199.

Lien for towing or storage, ordered by public officer, of motor vehicle. 85 A.L.R.3d 199.

**45-806. Lien for making, altering, or repairing personal property.** — Any person, firm or corporation, who makes, alters or repairs any article of personal property, at the request of the owner or person in legal possession thereof, has a lien, which said lien shall be superior and prior to any security interest in the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two (2) months after the work is done, the person, firm or corporation may proceed to sell the property at public auction, by giving ten (10) days' public notice of the sale by advertising in some newspaper published in the county in which the work was done; or, if there be no newspaper published in the county, then by posting up notices of the sale in three (3) public places in the town where the work was done, for ten (10) days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; the remainder, if any, must be paid over to the owner thereof. Provided that the said person, firm or corporation who is about to make, alter or repair the said property, in order to derive the benefits of this section, must, before commencing said making, altering or repairing, give notice of the intention to so make, alter or repair said property, by registered mail, to any holder of a security interest which is of record in the county where said property is located, or in the office of the secretary of state, and, if a motor vehicle, to any holder of a security interest which may appear on



the certificate of title of said vehicle, at least three (3) days before commencing said making, altering or repairing and if notice in writing within said three (3) days be not given by such holder of a security interest notifying said firm or corporation not to perform said services then the said making, altering or repairing may proceed and the prior lien provided for herein attaches to said property. [R.S., § 3446; reen. R.C. & C.L., § 3447; C.S., § 6413; I.C.A., § 44-706; am. 1935, ch. 87, § 1, p. 152; am. 1967, ch. 272, § 12, p. 745; am. 1995, ch. 157, § 1, p. 635.]

**Compiler's notes.** Section 2 of S.L. 1935, ch. 87 repealed all laws and parts of laws in conflict therewith.

Section 10 of S.L. 1967, ch. 272 is compiled as § 45-108, § 11 was repealed and § 13 is compiled as § 45-904.

Section 32 of S.L. 1967, ch. 272 provided that the act should take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code.

**Cross ref.** Secured transactions, §§ 28-9-101 — 28-9-507.

#### ANALYSIS

Bona fide purchaser.

Foreclosure sale.

—Notice.

Furnishing fuel.

Lien.

—Possession.

Lien at other than owner's request.

Lien at owner's request.

#### Bona Fide Purchaser.

Purchaser of tractor at lien foreclosure sale for amount of minimum required bid was bona fide purchaser, even though owner's representative at sale attempted to reach agreement with lien holders at sale and failed; fact that purchaser knew of owner's claims on tractor did not prevent purchaser from becoming a bona fide purchaser in good faith as this knowledge was not the type which would interfere with purchaser's good faith act of purchase. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 916 P.2d 1287 (Ct. App. 1996).

#### Foreclosure Sale.

Where lien holder's right to collect the full amount of the debt due on repaired tractor by way of a lien foreclosure sale might have been subject to a timely challenge, tractor owner's failure to present challenge until after completed sale and transfer of property to bona fide purchaser precluded such a claim. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 916 P.2d 1287 (Ct. App. 1996).

#### —Notice.

Foreclosure sale of tractor, held by lien holder, which was conducted in one of the two counties where repair work was performed on

tractor was proper, where notice of sale was advertised in a newspaper published in one of the counties where repair work was done, the owner had actual notice of the sale, appeared through his representative and attempted to purchase property, and where owner failed to show any prejudice to him based on location of sale. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 916 P.2d 1287 (Ct. App. 1996).

#### Furnishing Fuel.

Person furnishing gasoline and nonfreezing mixture for truck is not entitled to lien under this section or § 45-805. *Neitzel v. Lawrence*, 40 Idaho 26, 231 P. 423 (1924).

#### Lien.

##### —Possession.

Mechanic's lien was not dependent upon the lien claimant's continued possession of tractor, where repair shop sent tractor to another dealer for required work on engine block, for purposes of transaction, dealer who did work on engine block was subcontractor of repair shop and its possession of tractor was properly imputed to repair shop. *Jahnke v. Mesa Equip., Inc.*, 128 Idaho 562, 916 P.2d 1287 (Ct. App. 1996).

#### Lien at Other Than Owner's Request.

The notice of intention to repair required by this section to be given to the holder of a security interest in the article to be repaired need not be given to the owner of the article when it is presented for repair by someone other than the owner in lawful possession. *American Mach. Co. v. Fitzpatrick*, 92 Idaho 416, 443 P.2d 1013 (1968).

#### Lien at Owner's Request.

In order to give lien, repairs and alterations on personal property must be made at request of owner. *Neitzel v. Lawrence*, 40 Idaho 26, 231 P. 423 (1924).

**Collateral References.** 7 Am. Jur. 2d, Auto and Highway Traffic, §§ 33-54.

Liens for repairs to or services in connection with an automobile. 62 A.L.R. 1485.

Right of bailee and his employees to lien for repairs on aircraft. 69 A.L.R. 316; 83 A.L.R. 333; 99 A.L.R. 173.

Priority between lien for repairs and right

of seller under a conditional contract. 36 A.L.R.2d 198.

Priorities as between vendor's lien and subsequent title or security interest obtained in another state to which a motor vehicle was removed. 42 A.L.R.2d 1168.

Lien for storage of motor vehicles. 48 A.L.R.2d 894; 85 A.L.R.3d 199.

Contractor's equitable lien upon percentage of funds withheld by contractee or lender. 54 A.L.R.3d 848.

Lien for towing or storage, ordered by public officer, of motor vehicle. 85 A.L.R.3d 199.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle. 74 A.L.R.4th 90.

**45-807. Lien of factor.** — A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are entrusted to him by the same principal. [R.S., § 3447; reen. R.C. & C.L., § 3448; C.S., § 6414; I.C.A., § 44-707.]

**Collateral References.** 32 Am. Jur. 2d, Factors and Commission Merchants, §§ 24-26.

35 C.J.S., Factors, §§ 45-48.

Necessity and sufficiency of notice or statement prescribed by Factor's Lien Law. 96 A.L.R.2d 727.

**45-808. Lien of banker.** — A banker has a general lien, dependent on possession, upon all property in his hands, belonging to a customer, for the balance due to him from such customer in the course of the business. [R.S., § 3448; reen. R.C. & C.L., § 3449; C.S., § 6415; I.C.A., § 44-708.]

**Cited in:** First Interstate Bank v. Gill, 108 Idaho 576, 701 P.2d 196 (1985).

Jeppesen v. Rexburg State Bank, 57 Idaho 94, 62 P.2d 1369 (1936).

#### ANALYSIS

Application.

Deposits, application of.

— Limitation.

Setoff.

#### Application.

This section is limited in its application to property taken by banker in the usual course of banking business, and does not operate to afford lien on stock of merchandise transferred to a bank in such manner as to constitute preference under bankruptcy law. In re Gesas, 146 F. 734 (9th Cir. 1906).

#### Deposits, Application of.

As against depositor, bank may at any time before actual payment to him apply deposit to payment of his matured debts or obligations held by bank. Holloway v. First Nat'l Bank, 45 Idaho 746, 265 P. 699 (1928).

Under this section, a bank may apply the deposit of an indorser without resorting to mortgage security securing the note.

#### — Limitation.

A credit union's exercise of its "self-help" right of set-off contained in the pledge agreement with the plaintiff and her husband did not require any court action to accomplish, and accordingly the statute of limitations was not implicated when the credit union set off funds deposited with it against defaulted loans of the husband. Smith v. Idaho State Univ. Fed. Credit Union, 114 Idaho 680, 760 P.2d 19 (1988).

#### Setoff.

When a bank applies customer's funds to a debt owed by him to bank, it is acting pursuant to its right of setoff rather than exercising a banker's lien. Meyer v. Idaho First Nat'l Bank, 96 Idaho 208, 525 P.2d 990 (1974).

**Collateral References.** 10 Am. Jur. 2d, Banks, §§ 292, 854-858.

9 C.J.S., Banks and Banking, § 384.

Bank's lien upon commercial paper delivered to it by debtor for collection. 22 A.L.R.2d 478.

**45-809. Lien for cooperative corporations or associations.** — Any cooperative corporation, as defined by Idaho Code, which provides goods or services to any person, firm or corporation, may set off any equity interest owned by such person, firm or corporation in the cooperative as a means of collecting obligations owed to it for such goods or services. Equity shall include, but not be limited to, membership stock, capital credits, accounts



representing capital credits, capital stock or patronage credits. The cooperative shall have a lien on and a continuing perfected security interest in such equity to secure payment of any indebtedness, whenever incurred, owed to the cooperative by the person, firm or corporation receiving goods or services. Such lien and continuing perfected security interest may be enforced by right of offset when it becomes due and payable under the articles or bylaws of the cooperative. The cooperative's right of offset shall not entitle the debtor to set off its obligations against equity interest it owns in the cooperative which are not yet an obligation of the cooperative payable under the article or bylaws of the cooperative. [I.C., § 45-809, as added by 1996, ch. 344, § 1, p. 1154.]

**45-810. Homeowner's association liens.** — (1) Whenever a homeowner's association levies an assessment against a lot for the reasonable costs incurred in the maintenance of common areas consisting of real property owned and maintained by the association, the association, upon complying with subsection (2) of this section, shall have a lien upon the individual lot for such unpaid assessments accrued in the previous twelve (12) months.

(2)(a) An association claiming a lien under subsection (1) of this section shall file in the county in which the lot or some part thereof is located a claim containing:

- (i) A true statement of the amount due for the unpaid assessments after deducting all just credits and offsets;
- (ii) The name of the owner, or reputed owner, if known;
- (iii) The name of the association; and
- (iv) A description, sufficient for identification, of the property to be charged with the lien.

(b) When a claim has been filed and recorded pursuant to this section and the owner of the lot subject to the claim thereafter fails to pay any assessment chargeable to such lot, then so long as the original or any subsequent unpaid assessment remains unpaid, such claim shall automatically accumulate the subsequent unpaid assessments without the necessity of further filings under this section.

(c) The claim shall be verified by the oath of an individual having knowledge of the facts and shall be recorded by the county recorder. The record shall be indexed as other liens are required by law to be indexed.

(d) Within twenty-four (24) hours after recording a lien on the property, the association shall serve, by personal delivery to the owner or reputed owner or by certified mail to the last known address of the owner or reputed owner, a true and correct copy of the recorded lien.

(3) The lien may be continued in force for a period of time not to exceed one (1) year from the date the claim is filed and recorded under subsection (2) of this section; provided however, that such period may be extended by the homeowner's association for not to exceed one (1) additional year by recording a written extension thereof. For the purpose of determining the date the claim is filed in those cases when subsequent unpaid assessments have accumulated under the claim as provided in subsection (2) of this

section, the claim regarding each unpaid assessment shall be deemed to have been filed at the time such unpaid assessment became due. The lien may be enforced by the board of directors acting on behalf of the association.

(4) This section does not prohibit a homeowner's association from pursuing an action to recover sums for which subsection (1) of this section creates a lien or from taking a deed in lieu of foreclosure in satisfaction of the lien.

(5) An action to recover a money judgment for unpaid assessments may be maintained without foreclosing or waiving the lien securing the claim for unpaid assessments. However, recovery on the action operates to satisfy the lien, or the portion thereof, for which recovery is made.

(6) As used in this section, "homeowner's association" means any incorporated or unincorporated association:

(a) In which membership is based upon owning or possessing an interest in real property; and

(b) That has the authority, pursuant to recorded covenants, bylaws or other governing instruments, to assess and record liens against the real property of its members.

(7) In order to file a lien as provided in this section, a homeowner's association that is an unincorporated association must be governed by bylaws which provide for at least the following:

(a) A requirement that the homeowner's association hold at least one (1) meeting each calendar year;

(b) A requirement that notice of any meeting of the homeowner's association be published and distributed to all members of the homeowner's association;

(c) A requirement that the minutes of all homeowner's association meetings be recorded;

(d) A method of adopting and amending fees; and

(e) A provision providing that no fees or assessments of the homeowner's association may be increased unless a majority of all members of the homeowner's association vote in favor of such increase. [I.C., § 45-810, as added by 2002, ch. 275, § 1, p. 807.]

## CHAPTER 9

### MORTGAGES IN GENERAL

#### SECTION.

45-901. Mortgage defined.

45-902. Mortgage must be in writing.

45-903. Lien of mortgage is special.

45-904. Transfers deemed mortgages.

45-905. Defeasance may be shown by parol.

45-906. Extent of mortgage lien.

45-907. Subsequent title inures to mortgagee.

45-908. Power of attorney to mortgage.

45-909. Recording assignment of mortgage.

#### SECTION.

45-910. Record of assignment not notice to mortgagor.

45-911. Assignment of debt carries security.

45-912. Marginal discharge of mortgage.

45-913. Discharge of mortgage on certificate.

45-914. Record of discharge.

45-915. Mortgage — Satisfaction — Failure to release of record — Penalty.

45-916. Application to real property only.

**45-901. Mortgage defined.** — Mortgage is a contract excepting a trust deed or transfer in trust by which specific property is hypothecated for the



performance of an act without the necessity of a change of possession. [R.S., § 3350; reen. R.C. & C.L., § 3388; C.S., § 6355; I.C.A., § 44-801; am. 1957, ch. 181, § 16, p. 345.]

**Compiler's notes.** Section 15 of S.L. 1957, ch. 181, is compiled as § 45-1515.

**Cross ref.** Foreclosure of mortgages, §§ 6-101 — 6-104.

**Mortgage not a conveyance,** § 6-104.

**Mortgage to secure performance of future obligations,** § 45-108.

**Trust deeds,** §§ 45-1502 — 45-1515.

**Cited in:** *State v. Snyder*, 71 Idaho 454, 233 P.2d 802 (1951); *Quintana v. Anthony*, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985); *Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986); *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989).

#### ANALYSIS

**Bill of sale, retransfer, evidence for jury.**

**Deed absolute as mortgage.**

**Enforceability.**

**Estoppel, none for failure to tender.**

**Form of indebtedness.**

**Form of mortgage.**

**Indebtedness as test whether instrument is mortgage.**

**Jury question as to effect of bill of sale and retransfer.**

**Law as part of mortgage — Note and mortgage construed together.**

**Lien of mortgage survives how long.**

**Meaning of "mortgage."**

**Payment of taxes and water assessments becomes part of the mortgage debt.**

**Security instrument.**

**Sufficiency of evidence to establish a mortgage.**

**Trust deeds exempt from application.**

#### Bill of Sale, Retransfer, Evidence for Jury.

Where the question was whether a bill of sale of property and a conditional sale contract with respect to the same property were a chattel mortgage or an absolute conveyance from one to another, the evidence was sufficient to require the submission of the issues to a jury. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### Deed Absolute as Mortgage.

Deed absolute on its face is a mortgage if it is a transfer, other than a trust, made only as security for the performance of another act. *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115 (1911); *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 143 P. 1178 (1914).

#### Enforceability.

As between the parties, the chattel mortgages are enforceable and will be given full

weight even though ineffective as to third persons because of lack of notice. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

#### Estoppel, None for Failure to Tender.

Where a plaintiff, suing for conversion of his automobile, where the transaction grew out of a bill of sale from the plaintiff to the defendant and a conditional sales contract, executed by the plaintiff to the defendant, as on purchase, and where the plaintiff did not tender the amount of his indebtedness or offer to have it deducted from the amount claimed, this does not estop him from urging that the transaction constituted a chattel mortgage securing an indebtedness. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### Form of Indebtedness.

Debt for which mortgage is given may consist in the faithful performance of a duty resting upon mortgagor, if it is capable of being reduced to money value. *Dover Lumber Co. v. Case*, 31 Idaho 276, 170 P. 108 (1918), overruled on other grounds, *David Steed & Assocs. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988).

#### Form of Mortgage.

Whatever the form of agreement may be, if it in fact amounts to a mortgage it will be so considered. *Payette-Boise Water Users' Ass'n v. Fairchild*, 35 Idaho 97, 205 P. 258 (1922).

Subscription contract for shares in water users' association, whereby it is agreed that payments on authorized assessments shall be secured by lien on shares and lands of subscriber, to be enforced by foreclosure and sale as in case of mortgages, constitutes mortgage within definition of this section. *Payette-Boise Water Users' Ass'n v. Fairchild*, 35 Idaho 97, 205 P. 258 (1922).

Where there is no change of possession nor conveyance of property but a simple hypothecation of described property for payment of debt, transaction is mortgage within meaning of this section. *Payette-Boise Water Users' Ass'n v. Fairchild*, 35 Idaho 97, 205 P. 258 (1922).

The conclusion reached by the trial court that securities credit corporation was a general creditor was correct, acknowledgments to the chattel mortgages being void and the instruments not meeting the requirements by being properly acknowledged and lawfully filed under the chattel mortgage section. A judgment having been entered for the disposition for the property prevents the defendant from now availing himself of the statute by

correcting the errors in mortgages. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

#### **Indebtedness as Test Whether Instrument Is Mortgage.**

The test to determine whether an instrument is a mortgage or absolute conveyance is whether, at the time of the execution thereof, there was a debt owing from the giver of such instrument to the grantee or vendee therein, and whether such debt existed after the execution of the instrument. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

#### **Jury Question as to Effect of Bill of Sale and Retransfer.**

The question of whether a bill of sale of property and a conditional sale contract with respect thereto are to be construed as an absolute conveyance from one party to the other, and a contract to reconvey from the latter to the former, or whether they constitute a mortgage, is, in an action at law where the evidence is conflicting, for the jury. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### **Law as Part of Mortgage — Note and Mortgage Construed Together.**

It is well settled that the law existing when a mortgage is made enters into and becomes a part of the contract and a note and mortgage will be construed as one contract. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

#### **Lien of Mortgage Survives How Long.**

The life of a mortgage does not cease to exist so long as the notes secured by it are actionable, for the reason that the mortgage is an incident to the debt. So long as the note secured by a mortgage is kept alive, then it is actionable, and a note is kept alive, consequently either by the obligee signing an agreement promising payment, or making payment on principal or interest, and the mortgage lien will continue and remain unimpaired for five years thereafter. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

#### **Meaning of "Mortgage."**

A "mortgage" is a contract by which specific property is hypothecated for performance of an act without necessity of change of possession. *Eastern Idaho Loan & Trust Co. v. Blomberg*, 62 Idaho 497, 113 P.2d 406 (1941).

#### **Payment of Taxes and Water Assessments Becomes Part of the Mortgage Debt.**

Under provision in a mortgage that, if the mortgagor failed to pay taxes and water assessments, mortgagee could pay the same and such payments would become a part of the mortgage debt, such provision is upheld, and mortgagee is entitled to have payments made

by him for taxes and water assessments become a part of the mortgage debt and secured accordingly. *Union Cent. Life Ins. Co. v. Nielson*, 62 Idaho 483, 114 P.2d 252 (1941).

#### **Security Instrument.**

A security instrument, however it is called, is a mortgage whenever real property is encumbered as security for a debt or liability; accordingly where the instrument in question encumbered all of the vendee's right, title and interest in an installment land sale and the real property subject thereto in consideration of a loan evidenced by a promissory note, it was of no consequence that the form of encumbrance was an assignment of the vendee's interest in the contract, describing the property which was the subject of the contract — rather than a mortgage. *Rush v. Anestos*, 104 Idaho 630, 661 P.2d 1229 (1983).

#### **Sufficiency of Evidence to Establish a Mortgage.**

The facts were sufficient to warrant a holding that a deed and contract given the same time should be construed together as one transaction, and not as a separate and distinct transaction, and that they constituted a mortgage. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

#### **Trust Deeds Exempt from Application.**

By the 1957 Acts, No. 181, this section and § 45-904 were amended to eliminate trust deeds from their operation and likewise the mortgage laws, directing attention to §§ 6-101 and 6-104 which were amended to draw a distinction between a trust deed or transfer in trust and a mortgage to the effect that mortgage foreclosure proceedings are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by chapter 181, such procedure being set out in §§ 45-1503, 45-1505 also requiring the recording of the trust deed and any assignment thereof and § 45-1506 requiring notice of trustee sale, detailing the complete procedure for sale. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

#### **Collateral References.** 59 C.J.S., Mortgages, § 1 et seq.

Effect on validity of a mortgage of an attempt to evade taxation by taking the mortgage in the name of, or assigning it to, a third person. 21 A.L.R. 396.

Chattels annexed to realty as subject to prior mortgages. 41 A.L.R. 601; 88 A.L.R. 1114; 99 A.L.R. 144.

Effect of mortgage on marketability of a title. 57 A.L.R. 1253.

Change of deed intended as a mortgage into an absolute deed by subsequent agreement. 65 A.L.R. 771.

Deed absolute on its face, with a contemporaneous agreement for repurchase by the



grantor, as a mortgage vel non. 79 A.L.R. 937; 155 A.L.R. 1104.

Validity of mortgage securing unlimited future advances. 81 A.L.R. 631.

Considering the value of the property in a determination of whether a deed is intended as a mortgage. 90 A.L.R. 953; 89 A.L.R.2d 1040.

Constitutionality of a statute giving a lien for alterations of property, pursuant to a public requirement, preference over preexisting mortgage. 121 A.L.R. 616; 141 A.L.R. 66.

Deed to a mortgagee with option or contract for repurchase by the mortgagor as a deed or a mortgage. 129 A.L.R. 1473.

Effect of mortgage as a reconversion into land of property equitably converted. 130 A.L.R. 1410.

Estoppel of mortgagee by his statements to a prospective purchaser as to amount due or to become due. 142 A.L.R. 615.

Amount of attorney's compensation for services in matters involving mortgages. 143 A.L.R. 672.

Mortgagee in forged or unauthorized mort-

gage, proceeds of which are used to discharge valid lien, as entitled to equitable lien. 151 A.L.R. 407.

Conveyance or mortgage purporting to cover real estate or interest therein as effective by way of equitable lien, in respect to grantor's or mortgagor's interest in proceeds of sale under will working an equitable conversion. 153 A.L.R. 1091.

Mortgagee's possession before foreclosure as barring right of redemption. 7 A.L.R.2d 1131.

Association, power and capacity of members of unincorporated association, lodge, society, or club to convey, transfer, or encumber association property. 15 A.L.R.2d 1451.

Validity, construction, and application of clause entitling mortgagee to acceleration of balance due in case of conveyance of mortgaged property. 69 A.L.R.3d 713; 22 A.L.R.4th 1266; 61 A.L.R.4th 1070.

Excessiveness or adequacy of attorneys' fees in matters involving real estate — modern cases. 10 A.L.R.5th 448.

**45-902. Mortgage must be in writing.** — A mortgage, deed of trust or transfer in trust can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property. [R.S., § 3351; reen. R.C. & C.L., § 3389; C.S., § 6356; I.C.A., § 44-802; am. 1957, ch. 181, § 17, p. 345.]

**Compiler's notes.** Section 18 of S.L. 1957, ch. 181, is compiled as § 45-904.

**Cross ref.** Conveyance of real property, § 55-601 et seq.

**Cited in:** *Rowe v. Stevens* (1913), 25 Idaho 237, 137 P. 159; *Payette-Boise Water Users' Ass'n v. Fairchild*, 35 Idaho 97, 205 P. 258 (1922).

#### ANALYSIS

Application.

Estoppel.

Oral agreement insufficient.

Prohibited agreements.

Subordination agreement.

#### Application.

This section applies to all mortgages whether real or chattel. *Willows v. Rosenstien*, 5 Idaho 305, 48 P. 1067 (1897); *Keane v. Kibble*, 28 Idaho 274, 154 P. 972 (1915).

Contemporaneous agreement that mortgage shall operate as continuing security for floating balance of indebtedness not exceeding amount of mortgage is not extension of mortgage within meaning of this section. *Weiser Loan & Trust Co. v. Comerford*, 41 Idaho 172, 238 P. 515 (1925).

#### Estoppel.

Where stranger to mortgage purchases mortgaged property, and agrees that mortgage shall stand as security for purchase price, provisions of this section have no application, and purchaser is estopped to deny validity of the agreement although it is not executed in conformity to this section. *Burke Land & Live-Stock Co. v. Wells Fargo & Co.*, 7 Idaho 42, 60 P. 87 (1900).

#### Oral Agreement Insufficient.

In a mortgagor's action against a mortgagee to recover damages for alleged breach of an agreement "to dispose of foreclosure proceedings" of a second mortgage, allegation of an oral agreement to reinstate foreclosed second mortgage as first mortgage on property was purely "conclusion" in view of the statute expressly providing that a mortgage can be created, renewed or extended only by writing, executed with formalities required in the case of a grant or conveyance of real estate. *Toston v. Utah Mtg. Loan Corp.*, 115 F.2d 560 (9th Cir. 1940).

#### Prohibited Agreements.

Agreement to hold a mortgage for individual indebtedness when said mortgage has been included in a subsequent copartnership mortgage which has been satisfied is contrary

to provisions of this section. *Willows v. Rosenstien*, 5 Idaho 305, 48 P. 1067 (1897).

Lien of mortgage cannot be extended beyond its terms so as to secure a debt not named therein, or to hypothecate property not covered by mortgage, except by a compliance with the provisions of this section; but this does not preclude mortgagor from waiving statute of limitations as to mortgage debt by indorsing an acknowledgment to pay debt on note and mortgage. *Moulton v. Williams*, 6 Idaho 424, 55 P. 1019 (1899).

Parties to usurious contract secured by trust deed cannot remove usurious character of transaction by an agreement between themselves, and thus make trust deed a lien for interest and costs as against junior mortgagee, who is not a party to the agreement, and whose rights will be prejudiced thereby. *Madsen v. Whitman*, 8 Idaho 762, 71 P. 152 (1902).

#### **Subordination Agreement.**

The subordination agreement could not be elevated to the position of a mortgage or deed of trust where it lacked the formalities of such required under this section. *Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986).

**45-903. Lien of mortgage is special.** — The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession. [R.S., § 3352; reen. R. C. & C.L., § 3390; C.S., § 6357; I.C.A., § 44-803.]

**Cited in:** *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

#### **ANALYSIS**

Payments to prevent foreclosure.  
Rights of junior mortgagee.

#### **Payments to Prevent Foreclosure.**

Since the second deed of trust held by the seller of house was functionally equivalent to a mortgage, the holders' lien was special; accordingly, § 45-105 entitled them to include payments they made to prevent foreclosure of the first deed of trust as part of the mortgage indebtedness created by their junior encumbrance. *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

**Collateral References.** Rights and remedies of one who advances money to purchase real estate under an oral agreement by the vendee to give a mortgage thereon as security. 18 A.L.R. 1098.

Sufficiency and construction of description in a mortgage as "all" of the grantor's property or "all" of his property in a certain locality. 55 A.L.R. 162.

Effect on the operation of a mortgage as notice to a third person of an omission of the amount of the debt in the mortgage. 145 A.L.R. 369.

Effect on a mortgage of an uncertainty of description of an excepted area. 162 A.L.R. 288.

Limitation of actions, contracts in writing within statute. 3 A.L.R.2d 836.

Joining in subsequent instruments as ratification of or estoppel as to prior ineffective mortgage, deed of trust, or similar encumbrance. 7 A.L.R.2d 333.

Effect of supplying description of mortgaged property after manual delivery of mortgage. 11 A.L.R.2d 1372.

Which of conflicting descriptions in deeds or mortgages of fractional quantity of interest intended to be conveyed prevails. 12 A.L.R.4th 795.

#### **Rights of Junior Mortgagee.**

Junior mortgagee may raise question of usury in respect to first mortgage contract in the same manner as owner of property. *United States Bldg. & Loan Ass'n v. Lanzarotti*, 47 Idaho 287, 274 P. 630 (1929).

**Collateral References.** 59 C.J.S., Mortgages, §§ 198-203.

Mortgagee's right to an equitable lien on insurance taken out by purchaser of the equity of redemption. 38 A.L.R. 1404; 47 A.L.R. 1011.

Partition as affecting a preexisting mortgage or other lien on the undivided interest. 93 A.L.R. 1267.

**45-904. Transfers deemed mortgages.** — Every transfer of an interest in property other than in trust to secure the performance of any obligation of the trustor or other person named in the trust instrument, made only as a security for the performance of another act, is to be deemed a mortgage. [R.S., § 3353; reen. R.C. & C.L., § 3391; C.S., § 6358; I.C.A., § 44-804; am. 1957, ch. 181, § 18, p. 345; am. 1967, ch. 272, § 13, p. 745.]



**Compiler's notes.** Section 17 of S.L. 1957, ch. 181, is compiled as § 45-902.

Sections 12 and 14 of S.L. 1967, ch. 272 are compiled as §§ 45-806 and 45-909, respectively.

Section 32 of S.L. 1967, ch. 272 provided that this act should take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code.

#### ANALYSIS

Cancellation of defeasance.

Complaint, sufficiency against demurrer.

Construction.

Deed absolute on face.

Determination of question.

Equitable mortgage.

Estoppel, none for failure to make tender.

Foreclosure of mortgage.

Indebtedness as test whether instrument is mortgage.

Jury question whether transaction is mortgage.

Mortgage, evidence showing.

Pledge of lease.

Sale of mortgaged property.

Security, instrument given as.

Sufficiency of evidence.

Trust deeds.

"Trust" defined.

What constitutes mortgage.

#### Cancellation of Defeasance.

Defeasance may be voluntarily surrendered or canceled, and such action will render mortgage, whether it was in form a mortgage, or whether it was in form a conveyance absolute with defeasance provable by parol, an absolute deed and conveyance. *Smith v. Schultz*, 23 Idaho 144, 129 P. 640 (1912).

Equity of redemption may be purchased from mortgagor, and debt thereby be extinguished, and transfer become absolute. *Shaner v. Rathdrum State Bank*, 29 Idaho 576, 161 P. 90 (1916).

#### Complaint, Sufficiency Against Demurrer.

The complaint in the cited case held sufficient as against a general demurrer, whereby it was sought to have the transaction declared a mortgage. *Fond v. McCreery*, 55 Idaho 144, 39 P.2d 766 (1934).

#### Construction.

Provision of this section is rule of property and is recognized both at law and in equity. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

#### Deed Absolute on Face.

Deed absolute on its face cannot be held to be mortgage unless there is debt to be secured thereby, since mortgage is defeasible conveyance made simply to secure debt. *Shaner v.*

*Rathdrum State Bank*, 29 Idaho 576, 161 P. 90 (1916); *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

On issue as to whether deed absolute in form was intended as mortgage, test is whether there was subsisting debt after conveyance. *Clinton v. Utah Constr. Co.*, 40 Idaho 659, 237 P. 427 (1925); *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

Fee simple title is presumed to pass by grant of real property, and, independent of proof, presumption arises that instrument is what it purports on its face to be — an absolute conveyance. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

Rule is well recognized and established that deed absolute in form may be shown to have been intended as mortgage. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928); *Investors Mtg. Secur. Co. v. Hamilton*, 51 Idaho 113, 4 P.2d 347 (1931).

Where the grantee in deeds had advanced money to the grantor and, in some transactions, received promissory notes for the amounts advanced, such deeds were properly found to be mortgages. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

#### Determination of Question.

To justify trial court in determining that deed which purports to convey land absolutely in fee simple is mortgage, evidence must be clear, satisfactory and convincing. It must appear to court beyond reasonable controversy that it was intention of parties that deed should be mortgage. *Clinton v. Utah Constr. Co.*, 40 Idaho 659, 237 P. 427 (1925); *Drennan v. Lavender*, 41 Idaho 263, 238 P. 532 (1925); *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

Where evidence on question whether bill of sale with agreement to repurchase constitutes mortgage or pledge, determination is for jury. *Schleiff v. McDonald*, 41 Idaho 50, 237 P. 1108 (1925).

Decision of trial court upon conflicting or contradictory evidence is not open to review in appellate court. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

Parol evidence is admissible to show whether warranty deed with option to purchase back was conveyance or mortgage. *Investors Mtg. Secur. Co. v. Hamilton*, 51 Idaho 113, 4 P.2d 347 (1931).

Controlling question is whether or not debt is paid on execution and delivery of deed. *Investors Mtg. Secur. Co. v. Hamilton*, 51 Idaho 113, 4 P.2d 347 (1931).

#### Equitable Mortgage.

Where deed, absolute on its face, is taken to real property but is, in effect, an equitable mortgage, and plaintiff prays to have the same so declared, and no application is made

to foreclose said mortgage, proper form of decree is that plaintiff be allowed to redeem upon the payment of the sum found due within a reasonable time to be fixed by the decree, and that upon such payment the mortgage shall be adjudged to be satisfied, and that in default of such payment the title shall be quieted in defendant. *Machold v. Farnan*, 20 Idaho 80, 117 P. 408 (1911).

#### **Estoppel, None for Failure to Make Tender.**

Where plaintiff sued for conversion of his automobile, where the transaction grew out of a bill of sale from the plaintiff to the defendant and a conditional sales contract, executed by the plaintiff to the defendant, as on purchase, and where plaintiff did not tender the amount of his indebtedness or offer to have it deducted from the amount claimed, he was not estopped from urging that the transaction constituted a chattel mortgage securing an indebtedness. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### **Foreclosure of Mortgage.**

Where the transaction amounted to a mortgage, it must be foreclosed to satisfy the debt secured thereby. *Jaussaud v. Samuels*, 58 Idaho 191, 71 P.2d 426 (1937).

#### **Indebtedness as Test Whether Instrument Is Mortgage.**

The test to determine whether an instrument is a mortgage or absolute conveyance is whether, at the time of the execution thereof, there was a debt owing from the giver of such instrument to the grantee or vendee therein, and whether such debt existed after the execution of the instrument. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

Before an instrument, purporting to be an absolute conveyance on its face, can be construed as a mortgage or security, it is indispensable that there be an existing indebtedness. *Fond v. McCreery*, 55 Idaho 144, 39 P.2d 766 (1934).

#### **Jury Question Whether Transaction Is Mortgage.**

The question of whether a bill of sale of property and a conditional sale contract with respect thereto are to be construed as an absolute conveyance from one party to another, and a contract to reconvey from the latter to the former, or whether they constitute a mortgage, is, in an action at law where the evidence is conflicting, for the jury. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### **Mortgage, Evidence Showing.**

The facts were sufficient to warrant a holding that a deed and contract given at the same time should be construed together as one transaction, and not as a separate and dis-

tinct transaction, and that they constituted a mortgage. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933); *Jaussaud v. Samuels*, 58 Idaho 191, 71 P.2d 426 (1937).

#### **Pledge of Lease.**

Where a lease has been recorded as a chattel mortgage, a delivery of a copy thereof to a party having a second mortgage on a portion of the leased property constitutes a sufficient delivery of the lease as to amount to a valid pledge thereof. *Gem State Lumber Co. v. Galion Irrigated Land Co.*, 55 Idaho 314, 41 P.2d 620 (1935).

#### **Sale of Mortgaged Property.**

If mortgagor in arrears on chattel mortgage covering harvester transfers harvester by bill of sale to party who advances money to pay off mortgage, and mortgagor agrees to pay back amount advanced, such transaction does not constitute a sale of mortgaged property. *State v. Snyder*, 71 Idaho 454, 233 P.2d 802 (1951).

#### **Security, Instrument Given As.**

In the absence of an intent that an instrument should be treated as security only for debt, it will not be held to be a mortgage. *Northwestern & Pac. Hypotheekbank v. Nord*, 56 Idaho 86, 50 P.2d 4 (1935).

A security instrument, however it is called, is a mortgage whenever real property is encumbered as security for a debt or liability; accordingly where the instrument in question encumbered all of the vendee's right, title and interest in an installment land sale and the real property subject thereto in consideration of a loan evidenced by a promissory note, it was of no consequence that the form of encumbrance was an assignment of the vendee's interest in the contract, describing the property which was the subject of the contract — rather than a mortgage. *Rush v. Anestos*, 104 Idaho 630, 661 P.2d 1229 (1983).

#### **Sufficiency of Evidence.**

In order to establish a transaction as one constituting a mortgage, the evidence must be clearly convincing and satisfactory. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

The question is whether a bill of sale of property and a conditional sale contract with respect to the same property are a chattel mortgage or an absolute conveyance from one to another, with a contract to reconvey, and the evidence was sufficient to require the submission of the issues to a jury. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### **Trust Deeds.**

By the 1957 Acts, No. 181, § 45-901 and this section were amended to eliminate trust deeds from their operation and likewise the mortgage laws, directing attention to §§ 6-101 and 6-104 which were amended to draw a



distinction between a trust deed or transfer in trust and a mortgage to the effect that mortgage foreclosure proceedings are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by chapter 181, such procedure being set out in §§ 45-1503, 45-1505 also requiring the recording of the trust deed and any assignment thereof and § 45-1506 requiring notice of trustee sale, detailing the complete procedure for sale. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

### "Trust" Defined.

Transfer in trust mentioned by this section is one which creates a trust and absolutely conveys title from grantor, and not a deed of trust which hypothecates property for payment of the debt. *Brown v. Bryan*, 6 Idaho 1, 51 P. 995 (1896).

### What Constitutes Mortgage.

Deed absolute on its face and a separate agreement bearing same date as deed, for a reconveyance of the same tract of land to grantor upon payment of the consideration named in the deed, by specified time, constitute together a mortgage. *Kelly v. Leachman*, 3 Idaho 392, 3 Idaho 629, 29 P. 849, 33 P. 44 (1892); *Wilson v. Thompson*, 4 Idaho 678, 43 P. 557 (1896).

Where deed, absolute on its face, has been executed to secure payment of a debt, and it is clearly and satisfactorily established that in-

strument was intended only as security and that it is therefore only a mortgage, title to property remained in grantor. *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115 (1911).

Where instrument in writing in the form of deed of conveyance is executed and delivered as security for a debt, such instrument becomes a mortgage and not a deed, notwithstanding form of instrument. *Bergen v. Johnson*, 21 Idaho 619, 123 P. 484 (1912).

Warranty deeds, executed and delivered by insolvent debtor to corporation to which he was largely indebted at the time to secure debt, held, in effect, mortgages. *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 143 P. 1178 (1914).

Mortgage may be created by transfer of certain material to L. under a written contract providing that L. shall sign a note as security for B., who shall thereupon buy such material in the name of and for the sole use and benefit of L., and that, upon payment of the note, L. shall deliver and sell material to a third party, such transfer being for security only. *Larsen v. Roberts*, 32 Idaho 587, 187 P. 941 (1919).

Deed cannot be declared a mortgage unless there is a debt personal in its nature and enforceable against parties independent of security. *Clinton v. Utah Constr. Co.*, 40 Idaho 659, 237 P. 427 (1925).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 1268-1387.

59 C.J.S., Mortgages, §§ 381-426.

**45-905. Defeasance may be shown by parol.** — The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a trustee under any trust deed or transfer in trust, or a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument. [R.S., § 3354; reen. R.C. & C.L., § 3392; C.S., § 6359; I.C.A., § 44-805; am. 1957, ch. 181, § 19, p. 345.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Section 20 of S.L. 1957, ch. 181, is compiled as § 45-907.

**Cited in:** *In re Gould*, 78 Bankr. 590 (D. Idaho 1987).

### ANALYSIS

Conclusion not a statement of fact.

Deed absolute as mortgage.

Evidence.

—Form of instrument.

—Purpose of instrument.

Foreclosure of deed as mortgage.

Indebtedness as test to determine nature of instrument.

Innocent third parties.

Intention of parties.

Questions of fact.

Sale of mortgaged property.

### Conclusion Not a Statement of Fact.

A statement in an agreement by one of the parties that he had no interest in the realty covered by the agreement constitutes a mere conclusion and is not a statement of fact. *Jaussaud v. Samuels*, 58 Idaho 191, 71 P.2d 426 (1937).

### Deed Absolute as Mortgage.

Warranty deeds executed and delivered by insolvent debtor to corporation to which he was largely indebted at the time to secure the debt held, in effect, mortgages. *Capital Lumber Co. v. Saunders*, 26 Idaho 408, 143 P. 1178 (1914).

Whether or not deed absolute in form is mortgage is mixed question of law and fact to

be determined from all evidence, written or parol; and in determining it, all facts and circumstances attending transaction should be considered. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

Rule applies whether or not deed is warranty deed and whether deed is accompanied by condition or matter of defeasance expressed in deed, contained in separate instrument or existing merely in parol. *Wright v. Rosebaugh*, 46 Idaho 526, 269 P. 98 (1928).

In determining whether instrument is conveyance or mortgage, determining question is whether or not debt is paid on execution and delivery of deed. *Investors Mtg. Secur. Co. v. Hamilton*, 51 Idaho 113, 4 P.2d 347 (1931).

Under this section, parol evidence was admissible to show that purported deeds were in fact mortgages and so intended by the parties. *Gem-Valley Ranches, Inc. v. Small*, 90 Idaho 354, 411 P.2d 943 (1966).

### **Evidence.**

Parol evidence is admissible to show that deed absolute on its face is, in fact, a mortgage. *Thompson v. Burns*, 15 Idaho 572, 99 P. 111 (1908); *Investors Mtg. Secur. Co. v. Hamilton*, 51 Idaho 113, 4 P.2d 347 (1931); *Smith v. Swendsen*, 57 Idaho 715, 69 P.2d 131 (1937).

In the instant case, the facts were held sufficient to warrant a holding that a deed and contract given at the same time should be construed together as one transaction, and not as a separate and distinct transaction, and that they constituted a mortgage. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933); *Jausaud v. Samuels*, 58 Idaho 191, 71 P.2d 426 (1937).

The exclusion of evidence of the intention of the parties that a deed was intended as a mortgage was not prejudicial in view of evidence that was admitted of indebtedness of the grantors to the grantee before and after the conveyance, of lack of monetary payment by the grantee to the grantors, and the grantee's cancellation of a note and mortgage at the time of the conveyance without extinguishment of the debt. *Credit Bureau v. Sleight*, 92 Idaho 210, 440 P.2d 143 (1968).

An option, when exercised, is a contract for the conveyance of property; however, a conveyance which appears absolute in form may be shown by extrinsic evidence actually to be security for a debt. The proof must be by clear and convincing evidence. *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App. 1985).

Where the grantee denied that she promised to convey the property back to the original owner, but conceded being informed of his previous ownership and that the third party, who conveyed the deed to her, had agreed to reconvey it to the original owner, the grantee could not be said to have taken the deed

"without notice," and therefore did not come within the exception of this section, and parol evidence on the question of defeasance was admissible. *Kreiensteck v. Cook*, 108 Idaho 657, 701 P.2d 277 (Ct. App. 1985).

### **—Form of Instrument.**

Upon a proper showing, the form of an instrument yields to its underlying purpose: a deed may be shown actually to be a mortgage; the apparent conveyance of an ownership interest under an installment sale contract may be shown actually to be the creation of a security interest; and an option may be shown to merely secure a debt. *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App.), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

### **—Purpose of Instrument.**

The criteria for evaluating whether the purpose of an instrument is the creation of a security interest are: (a) the existence of a debt to be secured; (b) survival of the debt after execution of the instrument in question; (c) any previous negotiations of parties; (d) the inadequacy of consideration for an outright conveyance; (e) the financial condition of the purported grantor; and (f) the intention of the parties. *McGill v. Lester*, 108 Idaho 561, 700 P.2d 964 (Ct. App.), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

### **Foreclosure of Deed as Mortgage.**

Where a transaction amounts to a mortgage, it must be foreclosed to satisfy the debt secured thereby. *Jausaud v. Samuels*, 58 Idaho 191, 71 P.2d 426 (1937).

### **Indebtedness as Test to Determine Nature of Instrument.**

Deed absolute on its face cannot be held to be a mortgage unless there is a debt to be secured thereby, and evidence must be clear that it was not a sale. *Bergen v. Johnson*, 21 Idaho 619, 123 P. 484 (1912); *Shaner v. Rathdrum State Bank*, 29 Idaho 576, 161 P. 90 (1916).

The test to determine whether an instrument is a mortgage or absolute conveyance is whether, at the time of the execution thereof, there was a debt owing from the giver of such instrument to the grantee or vendee therein, and whether such debt existed after the execution of the instrument. *Dickens v. Heston*, 53 Idaho 91, 21 P.2d 905, 90 A.L.R. 944 (1933).

Before an instrument purporting to be an absolute conveyance on its face, can be construed as a mortgage or security, it is indispensable that there be an existing indebtedness. *Fond v. McCreery*, 55 Idaho 144, 39 P.2d 766 (1934).

### **Innocent Third Parties.**

Proof cannot be made against innocent purchasers and encumbrancers that deed absolute on its face was intended as a mortgage,



unless that fact appears from the terms of the instrument itself. *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115 (1911).

#### **Intention of Parties.**

Whether instrument sued upon is a conditional sale note or a chattel mortgage, and whether or not respondent has mistaken his remedy, are questions which are dependent upon agreement of parties at time transaction was entered into, and must be decided from all facts and circumstances which will tend to show intent of parties. *Keane v. Kibble*, 28 Idaho 274, 154 P. 972 (1915).

Where written instruments are uncertain or ambiguous, parol evidence may be admitted to show the true intent of the parties. *Smith v. Swendsen*, 57 Idaho 715, 69 P.2d 131, 111 A.L.R. 441 (1937).

#### **Questions of Fact.**

Where question is whether a bill of sale of

property and a conditional sale contract with respect to the same property, are a chattel mortgage or an absolute conveyance from one to another, with a contract to reconvey, the evidence in the cited case was sufficient to require the submission of the issues to a jury. *Deichert v. Euerby*, 54 Idaho 14, 27 P.2d 981 (1933).

#### **Sale of Mortgaged Property.**

If mortgagor in arrears on chattel mortgage covering harvester transfers harvester by bill of sale to party who advances money to pay off mortgage, and mortgagor agrees to pay back amount advanced, such transaction does not constitute a sale of mortgaged property. *State v. Snyder*, 71 Idaho 454, 233 P.2d 802 (1951).

**Collateral References.** 59 C.J.S., Mortgages, § 35.

**45-906. Extent of mortgage lien.** — A mortgage is a lien upon everything that would pass by a grant or conveyance of the property. [R.S., § 3355; reen. R.C. & C.L., § 3393; C.S., § 6360; I.C.A., § 44-806.]

**Cited in:** *Kelly v. Leachman*, 3 Idaho 629, 33 P. 44 (1893); *Federal Land Bank v. Parsons*, 116 Idaho 545, 777 P.2d 1218 (Ct. App. 1989); *Federal Land Bank v. Parsons*, 118 Idaho 324, 796 P.2d 533 (Ct. App. 1990).

#### **ANALYSIS**

Effect of mortgage lien.  
Errors in mortgages.  
Law as part of mortgage.  
Life of mortgage lien.  
Third parties.

#### **Effect of Mortgage Lien.**

Mortgage, or any contract or instrument made only as security for payment of a debt, merely creates a lien on property therein described and leaves legal title in mortgagor or grantor, which title can only be divested by judicial sale in a suit or action under and in conformity with the statute. *Hannah v. Vensel*, 19 Idaho 796, 116 P. 115 (1911).

Chattel mortgage conveys no title to mortgagee, but gives mere lien on property mortgaged, as security. *Forbush v. San Diego Fruit & Produce Co.*, 46 Idaho 231, 266 P. 659 (1928).

#### **Errors in Mortgages.**

The conclusion reached by the trial court that Securities Credit Corporation was a general creditor was correct, acknowledgments to the chattel mortgages being void and the instruments not meeting the requirements by being properly acknowledged and lawfully filed under the chattel mortgage section. A

judgment having been entered for the disposition for the property prevents the defendant from now availing himself of the statute by correcting the errors in mortgages. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

#### **Law as Part of Mortgage.**

It is well settled that the law existing when a mortgage is made enters into and becomes a part of the contract. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

#### **Life of Mortgage Lien.**

The life of a mortgage does not cease to exist so long as the notes secured by it are actionable, for the reason that the mortgage is an incident to the debt. So long as the note secured by a mortgage is kept alive, then it is actionable, and a note is kept alive either by the obligee signing an agreement promising payment, or making payment on principal or interest, and the mortgage lien will continue and remain unimpaired for five years thereafter. *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934).

#### **Third Parties.**

As between the parties, the chattel mortgages are enforceable and will be given full weight even though ineffective as to third persons because of lack of notice. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

**Collateral References.** 59 C.J.S., Mortgages, §§ 198-203.

Subrogation of a mortgagor, paying the mortgage debt after transfer of the property, to the rights of the mortgagee. 2 A.L.R. 243.

Waiver of mortgage lien by filing an unsecured claim against a decedent's estate. 2 A.L.R. 1132.

Contract requiring the mortgagee to look to the property alone as affecting the right to a deficiency judgment. 7 A.L.R. 718; 17 A.L.R. 714.

Personal obligation of the grantor as an essential element in a mortgage. 17 A.L.R. 714.

Redemption from mortgage or judicial sale as affecting a lien intervening between that under which property was sold and that under which it was redeemed. 26 A.L.R. 435.

Right of possession of junior mortgagee against senior mortgagee. 43 A.L.R. 388.

Priority between holders of different notes or obligations secured by the same mortgage or mortgages executed contemporaneously. 50 A.L.R. 543; 108 A.L.R. 485; 115 A.L.R. 40.

Release of a mortgagor by subsequent dealings between his grantee and the mortgagee. 72 A.L.R. 389; 81 A.L.R. 1016; 112 A.L.R. 1324.

**45-907. Subsequent title inures to mortgagee.** — Title acquired by a mortgagor subsequent to the execution of the mortgage or by a grantor subsequent to the execution of the trust deed inures to the mortgagee or trustee in like manner as if acquired before the execution. [R.S., § 3356; reen. R.C. & C.L., § 3394; C.S., § 6361; I.C.A., § 44-807; am. 1957, ch. 181, § 20, p. 345.]

**Compiler's notes.** Section 19 of S.L. 1957, ch. 181, is compiled as § 45-905.

#### ANALYSIS

##### Application.

Title acquired through subsequent quitclaim deed.

##### Application.

Where mortgage of a steam-actuated pumping plant, permanently affixed to mining ground, and appurtenances, is held to cover land upon which plant is located and which is necessary to its convenient and proper use, fact that mortgagors did not acquire legal title to such land until after mortgage was given does not prevent application of mortgage thereto. *Muckle v. Hill*, 32 Idaho 661, 187 P. 943 (1920).

Water right not in esse at time of execution of conveyance and hence not mentioned therein, but which was subsequently acquired, becomes appurtenant to land and will pass with title acquired under mortgage foreclosure. *Molony v. Davis*, 40 Idaho 443, 233 P. 1000 (1925).

This section has been held to apply to title

Effect of a mortgagee's loss of right against a grantee assuming the mortgage on the right of the mortgagor who is not released against the grantee. 73 A.L.R. 1177.

Liability of a grantee assuming a mortgage debt to his grantor. 76 A.L.R. 1191; 97 A.L.R. 1076.

Purchase of real property subject to a mortgage by the mortgagee as affecting his liability on a collateral chattel mortgage. 82 A.L.R. 765.

Attachment to a title acquired by the completion of a contract of a mortgage lien on the vendee's or optionee's interest. 85 A.L.R. 927.

Right of holder of negotiable paper secured by a mortgage to protection as regards defenses against the mortgage. 127 A.L.R. 190.

Priority between an assignee of rents and a mortgagee. 146 A.L.R. 1133.

Use of proceeds of forged or unauthorized mortgage to discharge a valid lien, as giving the mortgagee an equitable lien. 151 A.L.R. 407.

Priority between a tax or assessment lien and a mortgage held by a state or municipality. 159 A.L.R. 832.

acquired under homestead laws, although title was in United States when mortgage was given. *Bashore v. Adolph*, 41 Idaho 84, 238 P. 534 (1925).

Any title passing to defendant prior to decree in foreclosure inures to benefit of mortgagee foreclosing under this section. *State v. Gladish*, 48 Idaho 711, 284 P. 1034 (1930).

#### Title Acquired Through Subsequent Quitclaim Deed.

Where owner mortgages realty, and subsequently acquires a better title to the property purportedly mortgaged, the title subsequently acquired inures to the benefit of the mortgagee. *Booth v. Shepherd*, 63 Idaho 523, 123 P.2d 422 (1942).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 336, 337.

Application of the doctrine of after-acquired title in favor of the grantee as against a purchaser of the property at a foreclosure sale after the grantor acquired title. 25 A.L.R. 83.

Purchase money mortgagee as beneficiary of the rule that after-acquired title inures to the benefit of the mortgagee. 26 A.L.R. 173.

Right of a conditional seller of fixtures



against a mortgagee as affected by an after-acquired property clause in a mortgage. 111 A.L.R. 362; 141 A.L.R. 1283.

**45-908. Power of attorney to mortgage.** — A power of attorney to execute a mortgage, or deed of trust must be in writing, subscribed, acknowledged, or proved, certified and recorded in like manner as powers of attorney for grants of real property. [R.S., § 3357; reen. R.C. & C.L., § 3395; C.S., § 6362; I.C.A., § 44-808; am. 1957, ch. 181, § 21, p. 345.]

**Compiler's notes.** Section 22 of S.L. 1957, ch. 181, is compiled as § 45-1003.

knowledge of the facts of an attorney employed by both parties to the mortgagor and the mortgagee. 4 A.L.R. 1592; 38 A.L.R. 820.

**Collateral References.** Imputation of the

**45-909. Recording assignment of mortgage.** — An assignment of a mortgage may be recorded in like manner as a mortgage and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor. [R.S., § 3358; reen. R.C. & C.L., § 3396; C. S., § 6363; I.C.A., § 44-809; am. 1935, ch. 19, § 1, p. 37; am. 1967, ch. 272, § 14, p. 745.]

**Compiler's notes.** As enacted the section heading of this section read "Recording or filing assignment of mortgage."

Section 13 of S.L. 1967, ch. 272 is compiled as § 45-904.

Section 32 of S.L. 1967, chapter 272, provided that this act take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code.

#### **Unrecorded Lien of Assignee.**

Assignee not recording assignment lost lien as against subsequent purchaser of property who purchased without notice of assignee's claim and in reliance on recorded release by

mortgagee. *Millick v. O'Malley*, 47 Idaho 106, 273 P. 947 (1928).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 1085, 1088-1090.

59 C.J.S., Mortgages, §§ 226-232.

Validity of an unfiled renewal of a chattel mortgage against persons having notice thereof. 68 A.L.R. 274.

Assignee for creditors as within the protection of a statute requiring the filing or recording of a chattel mortgage. 71 A.L.R. 981.

Effect of recording laws on payment to the mortgagee after assignment. 89 A.L.R. 171; 104 A.L.R. 1301.

**45-910. Record of assignment not notice to mortgagor.** — The record of the assignment of a mortgage is not of itself notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee. [R.S., § 3359; reen. R.C. & C.L., § 3397; C.S., § 6364; I.C.A., § 44-810.]

**Sec. to sec. ref.** This section is referred to in § 28-9-311.

**Collateral References.** 59 C.J.S., Mortgages, §§ 233-246.

**45-911. Assignment of debt carries security.** — The assignment of a debt secured by mortgage carries with it the security. [R.S., § 3360; reen. R.C. & C.L., § 3398; C.S., § 6365; I.C.A., § 44-811.]

**Cross ref.** See note, § 45-909. *Millick v. O'Malley*, 47 Idaho 106, 273 P. 947 (1928).

#### **Assignment Without Authority.**

Where an administrator assigned the debt,

evidenced by a nonnegotiable note, secured by mortgage without authorization of probate court, as required, the assignee received no title to the security and had no right to foreclose the mortgage, under this section,

since the title and right to sue on the note did not pass to assignee. *Cummings v. Lowe*, 52 Idaho 1, 10 P.2d 1059 (1932).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 517-529, 1001-1004.

Reacquisition of title by the mortgagor or an intervening grantor, as affecting the assumption of a mortgage. 2 A.L.R. 350.

Merger effected by uniting the interest of a chattel mortgagor and mortgagee in the same person. 29 A.L.R. 702.

Rights of a vendee under an executory land contract against a subsequent mortgagee of the vendor. 87 A.L.R. 1505.

Effect on the lien of a mortgage of a levy on the mortgaged property by one taking an assignment of the mortgage. 92 A.L.R. 1291.

Right of purchaser of mortgaged property to demand assignment of the mortgage on payment of the mortgage. 93 A.L.R. 89.

Liability of a mortgagor as affected by a transaction between the chattel mortgagee and a purchaser of the mortgaged chattel. 93 A.L.R. 1203.

Agreement or transaction between a mortgagee and the purchaser of property who did not assume the mortgage as imposing a personal obligation on the purchaser for the mortgage debt. 94 A.L.R. 1329.

Conveyance of mortgaged property to a mortgagee, subject to the mortgage, as affecting the right to a personal judgment for the mortgage debt. 95 A.L.R. 89.

Personal liability to mortgagee of a purchaser of property subject to a chattel mortgage. 100 A.L.R. 1038.

Release of a mortgage by subsequent dealings between his grantee and the mortgagee. 112 A.L.R. 1324.

Enforcement of a legacy lien, charged upon land, against subsequent mortgagee of the devisee. 116 A.L.R. 32; 134 A.L.R. 361.

Consideration, assumption of mortgage as consideration for conveyance attached as in fraud of creditors. 6 A.L.R.2d 270.

**45-912. Marginal discharge of mortgage.** — A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgement in form substantially as follows:

"Signed and acknowledged before me this \_\_\_\_ day of \_\_\_\_\_ in the year of \_\_\_\_\_

"A. B., Recorder."

[1864, p. 528, § 36; R.S., § 3361; am. 1895, p. 54, § 1; reen. 1899, p. 249, § 1; reen. R.C. & C.L., § 3399; C.S., § 6366; I.C.A., § 44-812; am. 1967, ch. 272, § 15, p. 745.]

**Compiler's notes.** Section 32 of S. L. 1967, ch. 272, provided that this act, which amended various sections of this chapter to eliminate its application to personal property, take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code.

Section 33 of S. L. 1967, ch. 272 provided that contracts entered into before such date could be enforced as if the amendment had not occurred.

#### ANALYSIS

Application.

Discharge of lien.

Subsequent mortgagee.

#### Application.

In order to warrant discharge, terms of statute must be observed. *Walker v. Farmers' Bank*, 41 Idaho 279, 238 P. 968 (1925).

#### Discharge of Lien.

Lien of mortgage which is not discharged by marginal entry, as provided by this section or on certificate as provided in the following section, or by decree of court, remains in force. *Kelly v. Leachman*, 3 Idaho 629, 33 P. 44 (1893).

Mortgage must be discharged in one of three ways: 1. by entry in margin of record; 2. by certificate signed by mortgagee; 3. by decree of competent court. *Kelly v. Leachman*, 3 Idaho 629, 33 P. 44 (1893); *Walker v. Farmers' Bank*, 41 Idaho 279, 238 P. 968 (1925); *International Mtg. Bank v. Whitaker*, 44 Idaho 178, 255 P. 903 (1927); *Merchants Trust Co. v. Davis*, 49 Idaho 494, 290 P. 383 (1930).

Execution of renewal note and mortgage on same property accompanied by return of original note and copy of mortgage, marked "paid" does not discharge lien of first mortgage where it remains undischarged by one of the methods provided by statute. *Walker v. Farm-*



ers' Bank, 41 Idaho 279, 238 P. 968 (1925).

Taking second mortgage to secure same debt covered by first upon renewal of note secured by it, and upon same property, does not operate as satisfaction or release in law of first mortgage. *Walker v. Farmers' Bank*, 41 Idaho 279, 238 P. 968 (1925).

Execution of new mortgages, with understanding that original mortgage would be discharged if abstract of title showed new mortgages to be first and prior liens, did not amount to renewal and discharge of original mortgage as bearing on priority of lien for materials furnished before execution of new

mortgages. *International Mtg. Bank v. Whitaker*, 44 Idaho 178, 255 P. 903 (1927).

#### **Subsequent Mortgagee.**

Subsequent mortgagee not making proper inquiry with respect to unreleased first mortgage was not entitled to protection as bona fide purchaser. *Merchants Trust Co. v. Davis*, 49 Idaho 494, 290 P. 383 (1930).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 359-479.

Acceptance of past due interest as waiver of clause in mortgage. 97 A.L.R.2d 997.

**45-913. Discharge of mortgage on certificate.** — A recorded mortgage if not discharged as provided in the preceding section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representative or assigns, acknowledged or proved and certified as prescribed by the chapter on recording transfers, stating that the mortgage has been paid, satisfied or discharged: provided, that whenever a bank or the person appointed to liquidate the affairs of a bank as provided in section 26-908, has failed or neglected to issue a certificate showing the release, discharge or satisfaction of a real mortgage, the director of the department of finance, or his successor in office, may, upon the request of the owner, or any subsequent owner, or party in interest, issue to such party his certificate showing such mortgage to have been paid, discharged or satisfied even though the affairs of said bank have been completely liquidated. [1864, p. 528, § 37; R.S., § 3362; am. 1895, p. 54, § 2; reen. 1899, p. 249, § 2; reen. R.C. & C.L., § 3400; C.S., § 6367; I.C.A., § 44-813; am. 1945, ch. 91, § 1, p. 140; am. 1967, ch. 272, § 16, p. 745.]

**Compiler's notes.** The name of the commissioner of finance has been changed to the director of the department of finance on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 40, § 3 (§ 67-2403).

Section 2 of S. L. 1945, ch. 91 declared an emergency. Approved Feb. 28, 1945.

Section 32 of S.L. 1967, ch. 272, provided that this act take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code. See note to § 45-912.

**Cross ref.** Mortgages and releases of mortgages to be recorded by county recorder, § 31-2402; index, § 31-2404.

Notices of mechanics' liens to be recorded by county recorder, § 31-2402; index, § 31-2404.

Recording transfers, § 55-801 et seq.

See notes, § 45-912.

**Collateral References.** 59 C.J.S., Mortgages, § 228 et seq.

Giving of a quitclaim deed by a mortgagee to a mortgagor as satisfaction of the mortgage. 162 A.L.R. 556.

**45-914. Record of discharge.** — A certificate of the discharge of a real estate mortgage must be recorded, and a reference made in the record book to the book and page where the mortgage is recorded and in the minute of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded. [1864, p. 528, § 38; R.S., § 3363; reen. R.C. & C.L., § 3401; C.S., § 6368; am. 1927, ch. 128, § 1, p. 171; I.C.A., § 44-814; am. 1951, ch. 251, § 4, p. 540; am. 1959, ch. 72, § 4, p. 157; am. 1967, ch. 272, § 17, p. 745.]

**Compiler's notes.** Section 3 of S.L. 1951, ch. 251 and section 3 of S.L. 1959, ch. 72, compiled as § 45-1106, were repealed by S.L. 1967, ch. 161, § 10-102.

Section 5 of S.L. 1951, ch. 251 and section 5 of S.L. 1959, ch. 72 have been repealed.

Section 32 of S. L. 1967, ch. 272, provided that this act take effect at midnight on De-

cember 31, 1967, simultaneously with the Uniform Commercial Code. See note to § 45-912.

**Collateral References.** Effect of mortgage redemption by an assignor or one who had parted with his interest in the property. 57 A.L.R. 1021.

**45-915. Mortgage — Satisfaction — Failure to release of record — Penalty.** — When any mortgage, affecting the title to real property, has been satisfied, the holder thereof or his assignee must immediately, on the demand of the mortgagor, purchaser, or the successor in interest of either, execute, acknowledge, and deliver to him a certificate of the discharge thereof so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage or affecting the title to real property, to be entered of record; and any holder, or assignee of such holder, who refuses to execute, acknowledge, and deliver to the mortgagor, purchaser, or the successor in interest of either, the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, is liable to the mortgagor, purchaser, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of \$100. [1864, p. 528, § 39; R.S., § 3364; reen. R.C. & C.L., § 3402; C.S., § 6369; I.C.A., § 44-815; am. 1943, ch. 100, § 1, p. 194; am. 1967, ch. 272, § 18, p. 745.]

**Compiler's notes.** Section 32 of S.L. 1967, ch. 272, provided that this act take effect at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code. See note to § 45-912.

**Cited in:** *Barnes v. Buffalo Pitts Co.*, 6 Idaho 519, 57 P. 267 (1899); *Portneuf Lodge No. 20 v. Western Loan & Sav. Co.*, 6 Idaho 673, 59 P. 362 (1899); *Later v. Haywood*, 14 Idaho 45, 93 P. 374 (1908); *McDonald v. Challis*, 22 Idaho 749, 128 P. 570 (1912).

#### ANALYSIS

Accrual of action.

Accrual of interest.

Actions for penalties and damages.

—Evidence.

—Questions of fact.

—Right of action.

Appeal.

Attorney's fees.

Construction and application.

Elements of damage.

Pleading.

Tender necessary.

Trial by jury.

Usurious mortgages.

#### Accrual of Action.

Cause of action given by this section does not accrue until mortgage debt has been fully paid and demand for a discharge of mortgage

has been made. *Barnes v. Pitts Agric. Works*, 6 Idaho 259, 55 P. 237 (1898).

#### Accrual of Interest.

When a tender properly conditioned on delivery of a reconveyance deed has been made, no further interest accrues on the debt, regardless of the length of time that the trustee may take to deliver the reconveyance. *Brinton v. Haight*, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

A grantor of a deed of trust may condition a tender of full payment upon the contemporaneous delivery of a deed or reconveyance, and that such condition does not vitiate the tender's effectiveness to terminate the accrual of interest. *Brinton v. Haight*, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

#### Actions for Penalties and Damages.

##### —Evidence.

In an action to quiet title and for the penalty for failure to satisfy a mortgage, wherein defendant filed a cross-complaint on the mortgage, the evidence was sufficient to show that the plaintiffs were indebted to the defendant for a balance of instalments due, taxes, and outlay for bringing the abstract up-to-date, and that there existed a bona fide controversy concerning the amount due, and the court was justified in refusal to impose penalty for failure to satisfy a mortgage.



*Platts v. Pacific First Federal Savings & Loan Ass'n*, 62 Idaho 340, 111 P.2d 1093 (1941).

In an action for penalties and damages for a failure to satisfy mortgages, copies of the mortgagee's inter-office requests for releases of the mortgages involved and return memorandum containing such releases allegedly mailed to the mortgagor, were admissible only for the purpose of impeaching the testimony of the mortgagor that he had received no releases. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 149 P.2d 133 (1943).

In an action by a farm implements dealer for damages for a mortgagee's failure to satisfy chattel mortgages, the dealer's testimony of the value of contracts of employment, which he testified he was prevented from obtaining because the chattel mortgages in question had not been released, was improperly excluded. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 149 P.2d 133 (1943).

A judgment for penalties and damages for failure to satisfy mortgages was not reversible on the theory that, notwithstanding conditional sales contracts were removed from the jury's consideration, their baneful effect remained. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 149 P.2d 133 (1943).

Complaint for damages for failure to release chattel mortgages based on loss of profits for contemplated purchase of bred ewes was not proved where evidence showed that plaintiff was not in the sheep business at the time of the contemplated transaction and had not been for some years past. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

Plaintiff under count for statutory penalty for failure to release mortgage established a prima facie case of lack of good faith where there was evidence that defendant stated his refusal in following language: "that's my business, I will release them when I get d— good and ready to, to h— with you" and that when subsequently approached over the phone for release he was just mum and hung up the phone. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

#### —Questions of Fact.

In an action for penalties and damages for failure to satisfy mortgages, whether the mortgagee's defense that valid releases had been received by the mortgagor was established was for the jury. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 57, 149 P.2d 133 (1943).

In an action for penalties and damages for failure to satisfy a mortgage, whether the mortgagor's request of the mortgagee to satisfy the mortgage was sufficient was a question for the jury. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 149 P.2d 133 (1943).

The mortgagee is not liable for statutory penalty for failure to release mortgage if there

is a bona fide controversy over the amount due, and refusal to release is in good faith. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

Mortgagee was not excused from executing a joint release of six mortgages on the ground that there was a balance due on the last mortgage where the evidence showed that mortgagee owed the mortgagor on a running account. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

Refusal of mortgagee to release six mortgages could not be excused on the ground that there was no consideration for one of the mortgages, since a mortgage is not fraudulent merely because there is lack of consideration, and furthermore question of fraud can only be raised by the creditors in a proper proceeding. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

#### —Right of Action.

The statute permitting a mortgagor to recover penalties and damages for the mortgagee's failure to satisfy a mortgage gives the mortgagor a cause of action, notwithstanding he has disposed of the mortgaged property. *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 149 P.2d 133 (1943).

#### Appeal.

Mortgagor was entitled to a joint release of mortgages where the trial court entered an order that the clerk should enter of record satisfaction of the mortgages from which order the mortgagee made no appeal. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

#### Attorney's Fees.

Attorney's fees incurred in action to compel cancellation of usurious mortgage after payment of principal are recoverable as damages. *Cornelison v. United States Bldg. & Loan Ass'n*, 50 Idaho 1, 292 P. 243 (1930).

In a proceeding under this section for damages attorney fees are allowable in a proper case. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

Where mortgages were canceled as part of a judgment rendered on respondents' fourth cause of action, the proceedings on such cause of action are the matters to be considered in determining the reasonable amount of damages representing attorneys fees incurred by respondents and the allowance by the trial court of the sum of \$2,500 damages representing reasonable attorneys fees for the trial of such fourth cause of action was held not to be excessive. *Head v. Crone*, 79 Idaho 544, 324 P.2d 996 (1958).

Attorneys fees incurred as the result of the necessity of bringing an action under this section for the statutory penalty and for damages for wilful refusal to satisfy mortgages of record after payment of indebtedness due are

recoverable. *Head v. Crone*, 79 Idaho 544, 324 P.2d 996 (1958).

#### **Construction and Application.**

In action to foreclose mortgage, where it appears that mortgage was fraudulent, or, if not fraudulent, has been fully paid, and demand was made for release of same, and holder refuses to make release, a case is presented where the statute should be enforced. *Blackfoot State Bank v. Crisler*, 20 Idaho 379, 118 P. 775 (1911); *Cornelison v. United States Bldg. & Loan Ass'n*, 50 Idaho 1, 292 P. 243 (1930).

This section is penal and should be strictly construed; hence, penalty should not be imposed where facts obviously indicate a substantial controversy. *Harding v. Home Inv. & Sav. Co.*, 49 Idaho 64, 286 P. 920, 297 P. 1101 (1930).

#### **Elements of Damage.**

Plaintiff in an action for specific performance of a land contract cannot claim damages for the interest paid on the money borrowed to pay the purchase price, when he seeks and is permitted damages for the loss of use of the property. *Dohrman v. Tomlinson*, 88 Idaho 313, 399 P.2d 255 (1965).

Plaintiffs cannot be permitted to recover damages under this section for not being able to sell at a profit the same property in which they have been allowed damages for the loss of its use. *Dohrman v. Tomlinson*, 88 Idaho 313, 399 P.2d 255 (1965).

#### **Pleading.**

Complaint to recover the penalty prescribed by this section, must contain a direct and unequivocal allegation of payment of amount secured by mortgage; allegation that plaintiff has fully paid and satisfied the notes and mortgage insofar as holder of said notes and mortgage is concerned is insufficient. *Gamble v. Canadian & Am. Mfg. & Trust Co.*, 6 Idaho 202, 55 P. 241 (1898).

**45-916. Application to real property only.** — The provisions of this chapter shall apply to mortgages of real property only. [I.C., § 45-916, as added by 1967, ch. 272, § 19, p. 745.]

**Compiler's notes.** Section 20 of S.L. 1967, ch. 272 has been repealed.

Section 32 of S.L. 1967, chapter 272, provides that this act becomes effective at mid-

#### **Tender Necessary.**

One who claims to have made a tender is not entitled to damages under this section, for mortgagee's refusal to satisfy a mortgage, where facts show that a sufficient tender was not made. *Machold v. Farnan*, 20 Idaho 80, 117 P. 408 (1911).

The mortgagor under this section is not required to tender fees for the preparation and recording of a release once a mortgage is satisfied and a release demanded — even though terms of mortgage required expense of making and recording a release to be paid by the mortgagor. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

#### **Trial by Jury.**

Parties have absolute right to trial by jury. *Stevens v. Home Sav. & Loan Ass'n*, 5 Idaho 741, 51 P. 779 (1898).

Plaintiff is entitled to jury trial in an action filed to recover damages and penalty for failure of defendant to release mortgage. *Head v. Crone*, 76 Idaho 196, 279 P.2d 1064 (1955).

#### **Usurious Mortgages.**

Mortgage given to secure payment of usurious contract is satisfied upon the payment of principal debt, whereupon mortgagor is entitled to a satisfaction of such mortgage of record, and an action for such relief will lie under this section. *Cleveland v. Western Loan & Sav. Co.*, 7 Idaho 477, 63 P. 885 (1901); *Anderson v. Oregon Mtg. Co.*, 8 Idaho 418, 69 P. 130 (1902).

**Collateral References.** 55 Am. Jur. 2d, Mortgages, §§ 1321-1328.

54A Am. Jur. 2d, Mortgages, §§ 136-145.

Validity and construction of a statute allowing a penalty and damages against a mortgagee refusing to discharge a mortgage on real property. 56 A.L.R. 335.

Value of property as factor in determining whether deed was intended as mortgage. 89 A.L.R.2d 1040.

night on December 31, 1967, simultaneously with the Uniform Commercial Code. See note to § 45-912.



## CHAPTER 10

## MORTGAGE OF REAL PROPERTY

## SECTION.

45-1001. What may be mortgaged.

45-1002. Independent defeasance to be recorded.

45-1003. Acknowledgment and recordation.

## SECTION.

45-1004. Recording master forms — Incorporation of provisions into mortgages by reference — Recording fees.

**45-1001. What may be mortgaged.** — Any interest in real property which is capable of being transferred may be mortgaged. [R.S., § 3375; reen. R.C. & C.L., § 3403; C.S., § 6370; I.C.A., § 44-901.]

**Cross ref.** Partition of real estate, application of proceeds of sale when property encumbered, § 6-520; resort to other securities compelled, § 6-521.

**Cited in:** *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984); *Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986).

## ANALYSIS

Installment contract purchase of land.

Interest in property.

Property subject to mortgage.

**Installment Contract Purchase of Land.**

Vendees buying land under installment contract possessed a mortgagable interest in the property in question. *Rush v. Anestos*, 104 Idaho 630, 661 P.2d 1229 (1983).

**Interest in Property.**

Where the execution sale divested the judgment debtor of all the real property awarded

him by the partition order, except for his right of redemption, and he conveyed that away two days after the sale, since he had no interest in the property awarded him he could not be compelled to execute a mortgage on that property. *Suchan v. Suchan*, 113 Idaho 102, 741 P.2d 1289 (1986).

**Property Subject to Mortgage.**

Certificates of sale of school lands may be mortgaged. *Perkins v. Bundy*, 42 Idaho 560, 247 P. 751 (1926).

Interest of vendee under contract to purchase real estate is interest in land that may be transferred, and hence may be mortgaged. *Perkins v. Bundy*, 42 Idaho 560, 247 P. 751 (1926); *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984); *Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986).

**Collateral References.** 59 C.J.S., Mortgages, §§ 35-43.

**45-1002. Independent defeasance to be recorded.** — When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, is recorded in the office of the county recorder of the county where the property is situated. [R.S., § 3376; reen. R.C. & C.L., § 3404; C.S., § 6371; I.C.A., § 44-902.]

**45-1003. Acknowledgment and recordation.** — Mortgages, and deeds of trust or transfers in trust of real property may be acknowledged or proved, certified and recorded, in like manner and with like effect as grants and conveyances thereof. [R.S., § 3377; reen. R.C. & C.L., § 3405; C.S., § 6372; I.C.A., § 44-903; am. 1957, ch. 181, § 22, p. 345.]

**Compiler's notes.** Section 21 of S.L. 1957, ch. 181, is compiled as § 45-908.

Section 23 of S.L. 1957, ch. 181 repealed all acts and parts of acts in conflict therewith.

Section 24 of S.L. 1957, ch. 181 read: "If any clause, sentence, paragraph, section, or any part or portion of this act shall be declared or adjudged to be invalid or unconstitutional,

such invalidity or unconstitutionality shall not affect, invalidate, or nullify the remainder of this act."

Section 25 of S.L. 1957, ch. 181 declared an emergency. Approved March 9, 1957.

**Cross ref.** Acknowledgment of conveyances, § 55-701 et seq.

Recordation of conveyances, § 55-801 et seq.

**Collateral References.** 54A Am. Jur. 2d, Mortgages, §§ 90, 91.

Effect of notice of unrecorded mortgage on the priority between it and a judgment lien. 4 A.L.R. 434.

Necessity of filing a lease or contract which reserves title to crops in the lessor. 14 A.L.R. 1362.

Is a purchase money mortgage within the provision of a statute defeating or postponing a lien of an unrecorded or unfiled mortgage? 137 A.L.R. 571; 168 A.L.R. 1164.

**45-1004. Recording master forms — Incorporation of provisions into mortgages by reference — Recording fees.** — (1) An instrument containing a form or forms of covenants, conditions, obligations, powers, and other clauses of a mortgage or deed of trust may be recorded in the office of the county recorder of any county, and the recorder of such county, upon the request of any person, on tender of the lawful fees therefor, shall record the same. Every such instrument shall be entitled on the face thereof as a "Master form recorded by ... (name of person causing the instrument to be recorded)." Such instrument need not be acknowledged or proved or certified to be entitled to record.

(2) When any such instrument is recorded, the recorder shall index it under the name of the person causing it to be recorded in the manner provided for miscellaneous instruments relating to real property.

(3) Thereafter any of the provisions of such master form instrument may be incorporated by reference in any mortgage or deed of trust of real property situated within this state, if such reference in the mortgage or deed of trust states that the master form instrument was recorded in the county in which the mortgage or deed of trust is offered for record, the date when and the book and page where such master form instrument was recorded, and that a copy of such master form instrument was furnished to the person executing the mortgage or deed of trust. The recording of any mortgage or deed of trust which has so incorporated by reference therein any of the provisions of a master form instrument recorded as provided in this section shall have like effect as if such provisions of the master form so incorporated by reference had been set forth fully in the mortgage or deed of trust.

(4) Whenever a mortgage or deed of trust is presented for recording on which is set forth matter purporting to be a copy or reproduction of such master form instrument or part thereof, identified by its title as hereinabove provided and stating the date when it was recorded and the book and page where it was recorded, preceded by the words "do not record" or "not to be recorded," and plainly separated from the matter to be recorded as a part of the mortgage or deed of trust in such manner that it will not appear from a photographic reproduction of any page containing any part of the mortgage or deed of trust, such matter shall not be recorded; in such case the recorder shall record only the mortgage or deed of trust apart from such matter and shall not be liable for so doing, any other provisions of law to the contrary notwithstanding.

(5) For the purpose of any provision of law relating to fees for recording, entering or indexing, or relating to searches, furnishing of certified copies,



reproduction, or destruction of records, or to any other matter pertaining to the powers and duties of recorders, except the manner of indexing thereof, the master form instrument herein provided for shall be deemed a conveyance. [I.C., § 45-1004, as added by 1967, ch. 97, § 1, p. 206.]

**Compiler's notes.** The words in parentheses in subsection (1) so appeared in the law as enacted.

## CHAPTER 11

### AIRCRAFT IMPROVEMENT LIENS

#### SECTION.

45-1101. Aircraft improvement lien — Special lien dependent upon possession.

45-1102. Surrender of possession — Statutory lien.

45-1103. Notice of lien — Recordation.

#### SECTION.

45-1104. Persons considered owner of aircraft or related equipment, or authorized agent of owner.

45-1105. Priority.

45-1106. Enforcement of lien.

45-1107. Release or discharge of lien.

**45-1101. Aircraft improvement lien — Special lien dependent upon possession.** — (1) Any person, firm, or corporation who expends labor, skill, or materials upon an aircraft, aircraft engines, propellers, appliances, spare parts, or related equipment, at the request of its owner, reputed owner, authorized agent of the owner, or lawful possessor of the aircraft, has a special lien, dependent upon possession, on the aircraft for the just and reasonable charges for the labor performed and material furnished up to the amount of the written estimate or subsequent oral or written modifications thereto.

(2) Provided however, a person, firm, or corporation expending labor, skill or materials pursuant to the provisions of subsection (1) of this section shall not have a special lien on the aircraft unless the person, firm, or corporation delivers a written estimate regarding the nature and cost of repair work to the owner, reputed owner, authorized agent of the owner or lawful possessor of the aircraft prior to expending labor, skill or materials on the aircraft.

(3) If not paid within two (2) months after the work is done, the person, firm or corporation may proceed to sell the property at public auction after first providing written notice of the impending sale to the owner, reputed owner, authorized agent of the owner, or lawful possessor of the aircraft, as well as any known secured parties or lienholders, by United States mail, certified, return receipt requested, or equivalent private courier service that provides evidence of date of delivery of mail. The person, firm or corporation shall give ten (10) days' public notice of the sale by advertising in some newspaper published in the county in which the work was done; or, if there be no newspaper published in the county, then by posting notices of the sale in three (3) public places in the town where the work was done, for ten (10) days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; the remainder, if any, must be paid over to the other secured parties or lienholders, if any, and the owner. Provided however, that the person, firm or corporation who is about to make, alter or repair the aircraft or related

equipment, in order to derive the benefits of this section, must, before commencing such making, altering or repairing, give notice of the intention to so make, alter or repair the aircraft or related equipment, by registered mail, to any holder of a security interest which is of record at the FAA, at least three (3) days before commencing the making, altering or repairing, and if notice in writing within the three (3) days is not given by the holder of a security interest notifying such person, firm or corporation not to perform such services, then the making, altering or repairing may proceed and the prior lien provided for herein attaches to the aircraft or related equipment. [I.C., § 45-1101, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** This section, which comprised 1885, p. 74, § 1; R.S., § 3385; am. 1897, p. 6, § 1; reen. 1899, p. 292, § 1; reen. R.C. & C.L., § 3406; C.S., § 6373; am. 1925, ch. 76, § 1, p. 109; I.C.A., § 44-1001, was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

Former § 45-1101, which comprised 1885, p. 74, § 1; R.S., § 3385; am. 1897, p. 6, § 1; reen. 1899, p. 292, § 1; reen. R.C. & C.L., § 3407; C.S., § 6373; am. 1925, ch. 76, § 1, p. 109; I.C.A., § 44-1001, was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

**45-1102. Surrender of possession — Statutory lien.** — (1) Any person, firm, or corporation who expends labor, skill, or materials upon an aircraft, aircraft engines, propellers, appliances, or spare parts, at the request of its owner, reputed owner, or authorized agent of the owner, or lawful possessor of the aircraft, has a lien upon the aircraft, or related equipment, for the contract price of the expenditure, or in the absence of a contract price, for the reasonable value of the expenditure.

(2) The statutory lien created pursuant to this section:

(a) Is applicable to any civil aircraft engine, aircraft propeller, or aircraft appliance which is capable of having the ownership, or an interest in the ownership, affected by a conveyance, recorded at the federal aviation administration (FAA) aircraft registry;

(b) Is not dependent upon possession by the repairperson of the property which is subject to the lien;

(c) Is dependent upon the recordation of the lien at the FAA aircraft registry in accordance with section 45-1103, Idaho Code;

(d) Must be created by written contract between the parties, and any subsequent oral or written modifications thereto. The written contract must be signed by the customer, and predate the commencement of work for which the lien is applicable. [I.C., § 45-1102, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** This section, which comprised 1899, p. 292, § 1; reen. R.C. & C.L., § 3407; C.S., § 6374; I.C.A., § 44-1002; am. 1967, ch. 272, § 20, p. 745, was repealed by S.L. 1985, ch. 229, § 1.

Former § 45-1102, which comprised 1899, p. 292, § 1; reen. R.C. & C.L., § 3407; C.S., § 6374; I.C.A., § 44-1002; am. 1967, ch. 272, § 20, p. 745, was repealed by S.L. 1985, ch. 229, § 1.

**45-1103. Notice of lien — Recordation.** — The statutory lien created pursuant to section 45-1102, Idaho Code:

(1) Is not valid unless and until it is recorded with the FAA aircraft



registry in the manner and in the form generally required for the "Recording of Aircraft Titles and Security Documents" pursuant to 14 CFR 49.

(2) Is valid upon recordation by the FAA aircraft registry of a written document entitled "NOTICE OF AIRCRAFT LIEN." This document shall:

(a) Be signed by the repairperson or by a duly authorized agent or attorney of the repairperson; and

(b) Be verified by the person signing the notice of lien upon that person's personal knowledge of the matters stated in the notice of lien, and which shall affirmatively state: "I declare under penalty of perjury, in accordance with the laws of the state of Idaho and of the laws of the United States of America, that the matters stated herein are true and correct upon my information and belief."

(c) Contain the date and place of signing of the notice of lien.

(3) The notice of lien referred to in subsection (2) of this section shall contain the following information:

(a) The United States registration number, make, model and serial number of the aircraft subject to the lien;

(b) The name of the manufacturer, the model, and the serial number of all applicable engines, propellers or appliances subject to the lien, to the extent they are not otherwise identifiable merely by reference to the aircraft registration number;

(c) The name, address and business telephone number of the repairperson asserting the lien;

(d) The name, address and business telephone number of the registered owner of the civil aircraft or other property subject to the lien;

(e) The name, address and business telephone number of the person consenting to the performance of the work giving rise to the lien;

(f) The amount of the lien, exclusive of prospective storage costs;

(g) A narrative statement describing the nature of the work accomplished;

(h) The affirmative statement that a copy of the notice of lien is concurrently being sent by United States mail, certified, return receipt requested, or equivalent private courier service that provides evidence of date of delivery of mail, to both the registered owner and to the person consenting to the work;

(i) The date of last services or materials provided.

(4) No notice of lien pursuant to subsection (2) of this section is valid unless it is presented for recording at the FAA registry within one hundred eighty (180) days of the completion of the work giving rise to the lien. [I.C., § 45-1103, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** These sections were repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967. For law after repeal, see §§ 28-9-101 — 28-9-507.

These sections constituted the following:

45-1103: R.S., § 3386; am. 1890-1891, p. 181, § 1; reen. 1899, p. 121, § 1; reen. R.C. & C.L., § 3408; C.S., § 6375; am. 1929, ch. 250, § 1, p. 508; I.C.A., § 44-1003; am. 1935, ch. 85, § 1, p. 149; am. 1945, ch. 11, § 1, p. 14.

45-1103A: I.C., § 45-1103A, as added by 1965, ch. 270, § 1 p. 697.

45-1104: C.S., § 6375(a), as added by 1929, ch. 250, § 2, p. 508; I.C.A., § 44-1004.

45-1105: C.S., § 6375(b), as added by 1929, ch. 250, § 3, p. 508; I.C.A., § 44-1005.

45-1106: R.S., § 3387; am. 1890-1891, p. 181, § 2; reen. 1899, p. 121, § 2; reen. R.C. & C.L., § 3409; C.S., § 3676; am. 1921, ch. 137, § 1, p. 323; am. 1929, ch. 250, § 4, p. 508;

I.C.A., § 44-1006; am. 1951, ch. 251, § 3, p. 540; am. 1959, ch. 72, § 3, p. 157.

45-1107: 1885, p. 74, § 4; R.S., § 3388; reen. R.C. & C.L., § 3410; C.S., § 6377; am. 1929, ch. 250, § 5, p. 508; I.C.A., § 44-1107.

45-1108: 1885, p. 74, § 5; R.S., § 3389; reen. R.C. & C.L., § 3411; C.S., § 6378; am. 1929, ch. 256, § 1, p. 522; I.C.A., § 44-1008; am. 1951, ch. 251, § 10, p. 540; am 1959, ch. 72, § 10, p. 157.

45-1109: 1885, p. 74, § 6; R.S., § 3390; reen. R.C. & C.L., § 3412; C.S., § 6379; I.C.A., § 44-1009.

45-1110: 1885, p. 74, § 7; R.S., § 3391; am. 1905, p. 129, § 1; reen. R.C., § 3413; am. 1909, p. 149, § 1; reen. C.L., § 3413; C.S., § 6380; am. 1931, ch. 110, § 1, p. 190; I.C.A., § 44-1010.

45-1111: 1885, p. 74, § 8; R.S., § 3392; reen. R.C., § 3414; am. 1909, p. 149, § 2; reen. C.L., § 3414; C.S., § 6381; I.C.A., § 44-1011.

45-1112: 1885, p. 74, § 9; R.S., § 3393; reen. R.C., § 3415; am. 1909, p. 149, § 3; reen. C.L., § 3415; C.S., § 6382; I.C.A., § 44-1012.

45-1113: 1885, p. 74, § 10; R.S., § 3394;

reen. R.C., § 3416; am. 1909, p. 149, § 4; reen. C.L., § 3416; C.S., § 6383; I.C.A., § 44-1013.

45-1114: 1885, p. 74, § 11; R.S., § 3395; reen. R.C., § 3417; am. 1909, p. 149, § 5; reen. C.L., § 3417; C.S., § 6384; I.C.A., § 44-1014.

45-1115: 1885, p. 74, § 12; R.S., § 3396; reen. R.C. & C.L., § 3418; C.S., § 6385; I.C.A., § 44-1015.

45-1116: C.S., § 6385A, as added by 1931, ch. 140, § 1, p. 237; I.C.A., § 44-1016.

45-1117: 1885, p. 74, § 13; R.S., § 3397; reen. R.C. & C.L., § 3419; C.S., § 6386; I.C.A., § 44-1017.

45-1118: 1929, ch. 251, § 1, p. 511; I.C.A., § 44-1018.

45-1119: I.C.A., § 44-1019, as added by 1945, ch. 83, § 1, p. 129.

Former § 45-1103, which comprised R.S., § 3386; am. 1890-1891, p. 181, § 1; reen. 1899, p. 121, § 1; reen. R.C. & C.L., § 3408; C.S., § 6375; am. 1929, ch. 250, § 1, p. 508; I.C.A., § 44-1003; am. 1935, ch. 85, § 1, p. 149; am 145, ch. 11, § 1, p. 14 was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

**45-1104. Persons considered owner of aircraft or related equipment, or authorized agent of owner.** — The following persons are considered the owner of an aircraft or related equipment, or the authorized agent of the owner, for the purposes of this chapter:

(1) A person in possession of the aircraft or related equipment under an agreement to purchase it, whether title to the aircraft or related equipment is in the possession of the person or the vendor;

(2) A person in lawful possession of the aircraft or related equipment. [I.C., § 45-1104, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** Former § 45-1104, which comprised C.S., § 6375(a), as added by 1929, ch. 250, § 2, p. 508; I.C.A., § 44-1044

was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

**45-1105. Priority.** — A lien under section 45-1102, Idaho Code, when recorded in accordance with section 45-1103, Idaho Code, is superior to and preferred to:

(1) A lien, mortgage or encumbrance that attaches to the aircraft, or related equipment, after recording of the notice of lien under section 45-1103, Idaho Code.

(2) A prior lien, mortgage or other encumbrance, when the person furnishing the materials or performing the services did not have actual or constructive notice of the prior lien, mortgage or encumbrance, or the prior lien, mortgage or encumbrance was not recorded or filed in the manner provided by law.

(3) A lien that attaches to the aircraft or equipment on the basis of a security interest, if, prior to the expenditure of labor, skill or materials upon the aircraft or equipment, the person planning to make the expenditure



gives notice of that intention by United States mail, certified, return receipt requested, or equivalent private courier service that provides evidence of date of delivery of mail, to any holder of a security interest of record at the FAA prior to commencing such expenditure by sending such notice to the address of the holder of the security interest listed in the FAA record of lien, and the holder of the security interest does not respond within three (3) days of receipt of notice noting its opposition to the making of such an expenditure of labor, skill or materials. [I.C., § 45-1105, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** Former § 45-1105, which comprised C.S., § 6375(b), as added by 1929, ch. 250, § 3, p. 508; I.C.A., § 44-1005

was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

**45-1106. Enforcement of lien.** — (1) A suit to enforce a lien described in section 45-1102, Idaho Code, must be brought within twelve (12) months after the lien is recorded.

(2) The practice and procedure to enforce a lien shall be governed by the law applicable to the foreclosure of mechanics' and materialmen's liens provided however, that notice requirements shall also extend to secured parties or lienholders of record with the federal aviation administration.

(3) Any judgment entered by the court shall be deemed to be a "conveyance" within the meaning of subsection (a)(19) of 49 U.S.C. section 40102, and shall be recordable at the FAA aircraft registry pursuant to 14 CFR 49.17. [I.C., § 45-1106, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** Former § 45-1106, which comprised R.S., § 3387; am. 1890-1891, p. 181, § 2; reen. 1899, p. 121, § 2; reen. R.C. & C.L., § 3409; C.S., § 3676; am. 1921, ch. 137, § 1, p. 323; am. 1929, ch. 250,

§ 4, p. 508; I.C.A., § 44-1006; am. 1951, ch. 251, § 3, p. 540; am. 1959, ch. 72, § 3, p. 157 was repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

**45-1107. Release or discharge of lien.** — A lien under this chapter shall be released and discharged by the lien claimant or the agent of the lien claimant in accordance with the regulations of the federal aviation administration. [I.C., § 45-1107, as added by 2002, ch. 371, § 1, p. 1041.]

**Compiler's notes.** The following former sections were repealed by S.L. 1967, ch. 161, § 10-102, effective midnight, December 31, 1967.

45-1108 which comprised 1885, p. 74, § 5; R.S., § 3389; reen. R.C. & C.L., § 3411; C.S., § 6378; am. 1929, ch. 256, § 1, p. 522; I.C.A., § 44-1008; am. 1951, ch. 251, § 10, p. 540; am. 1959, ch. 72, § 10, p. 157.

45-1109 which comprised 1885, p. 74, § 6; R.S., § 3390; reen. R.C. & C.L., § 3412; C.S., § 6379; I.C.A., § 44-1009.

45-1110 which comprised 1885, p. 74, § 7; R.S., § 3391; am. 1905, p. 129, § 1; reen. R.C., § 3413; am. 1909, p. 149, § 1; reen. C.L., § 3413; C.S., § 6380; am. 1931, ch. 110, § 1, p. 190; I.C.A., § 44-1010.

45-1111 which comprised 1885, p. 74, § 8;

R.S., § 3392; reen. R.C., § 3414; am. 1909, p. 149, § 2; reen. C.L., § 3414; C.S., § 6381; I.C.A., § 44-1011.

45-1112 which comprised 1885, p. 74, § 9; R.S., § 3393; reen. R.C., § 3415; am. 1909, p. 149, § 3; reen. C.L., § 3415; C.S., § 6382; I.C.A., § 44-1012.

45-1113 which comprised 1885, p. 74, § 10; R.S., § 3394; reen. R.C., § 3416; am. 1909, p. 149, § 4; reen. C.L., § 3416; C.S., § 6383; I.C.A., § 44-1013.

45-1114 which comprised 1885, p. 74, § 11; R.S., § 3395; reen. R.C., § 3417; am. 1909, p. 149, § 5; reen. C.L., § 3417; C.S., § 6384; I.C.A., § 44-1014.

45-1115 which comprised 1885, p. 74, § 12; R.S., § 3396; reen. R.C., & C.L., § 3418; C.S., § 6385; I.C.A., § 44-1015.

- 45-1116 which comprised C.S., § 6385A, as added by 1931, ch. 140, § 1, p. 237; I.C.A., § 44-1016. § 6386; I.C.A., § 44-1017.
- 45-1117 which comprised 1885, p. 74, § 13; R.S., § 3397; reen. R.C. & C.L., § 3419; C.S., § 44-1018. § 1, p. 511; I.C.A., § 44-1018.
- 45-1119 which comprised I.C.A., § 44-1019, as added by 1945, ch. 83, § 1, p. 129.

## CHAPTER 12

### RECONVEYANCE

#### SECTION.

- 45-1201. Definitions.  
 45-1202. Conditions to reconveyance.  
 45-1203. Procedure for reconveyance.  
 45-1204. Objections to reconveyances.

#### SECTION.

- 45-1205. Liability of title insurance agent or underwriter.  
 45-1206. Payoffs prior to effective date.

#### **45-1201. Definitions. —** As used in this chapter:

(1) "Beneficiary" means both the record owner of the beneficiary's interest under a trust deed, including successors in interest.

(2) "Reconveyance" or "reconvey" means a reconveyance of a trust deed.

(3) "Satisfactory evidence" of the full payment of an obligation secured by a trust deed means a payoff letter, the original cancelled check or a copy, including a voucher copy, of a check, payable to the beneficiary or a servicer, and reasonable documentary evidence that the check was intended to effect full payment under the trust deed or an encumbrance upon the property covered by the trust deed.

(4) "Servicer" means a person or entity that collects loan payments on behalf of a beneficiary.

(5) "Title agent" means a title insurance agent duly licensed as an organization under chapter 27, title 41, Idaho Code.

(6) "Title insurer" means a title insurer duly authorized to conduct business in the state of Idaho under title 41, Idaho Code.

(7) "Trust deed" means a trust deed as defined in section 45-1502, Idaho Code. [I.C., § 45-1201, as added by 1995, ch. 326, § 1, p. 1092.]

**Compiler's notes.** Former §§ 45-1201 — 45-1205 which comprised S.L. 1933, ch. 74, §§ 1-5, p. 124, were repealed by S.L. 1967, ch. 161, § 10-102, effective at midnight on December 31, 1967.

Section 2 of S.L. 1995, ch. 326 is compiled as § 45-1502.

**45-1202. Conditions to reconveyance. —** A title insurer or title agent may reconvey a trust deed pursuant to the procedure prescribed in section 45-1203, Idaho Code, if the obligation secured by the trust deed shall have been fully paid by the title insurer or title agent that is permitted to reconvey the trust deed pursuant to section 45-1203, Idaho Code, or such title insurer or title agent shall possess satisfactory evidence of such payment in full. A title insurer or title agent may provide a reconveyance under section 45-1203, Idaho Code, whether or not it is then named as trustee under a trust deed. [I.C., § 45-1202, as added by 1995, ch. 326, § 1, p. 1092.]



**Compiler's notes.** Former § 45-1202 was repealed. See Compiler's Notes, § 45-1201.

of trust is satisfied is the deed reconveyed to the grantor. Defendant A v. Idaho State Bar, 132 Idaho 662, 978 P.2d 222 (1999).

**Satisfaction of Obligation.**  
Only after the obligation secured by a deed

**45-1203. Procedure for reconveyance.** — A title insurer or title agent may execute and record a reconveyance of a trust deed upon compliance with the following procedure:

(1) Not less than thirty (30) days after payment in full of the obligation secured by the trust deed and receipt of satisfactory evidence of payment in full has been effected, the title insurer or title agent may either: (a) mail a notice by certified mail with postage prepaid, return receipt requested, to the beneficiary or a servicer at its address set forth in the trust deed, and at any address for the beneficiary or servicer specified in the last recorded assignment of the trust deed, if any, and at any address for a beneficiary or servicer shown in any request for notice duly recorded pursuant to section 45-1511, Idaho Code; or (b) hand deliver a notice to the beneficiary or servicer. The notice shall be in substantially the following form and shall be accompanied by a copy of the reconveyance to be recorded:

NOTICE OF INTENT

TO RELEASE OR RECONVEY

TO: [Beneficiary] or [Servicer for Beneficiary]  
FROM: [Title insurer or Title agent]  
DATE: .....

Notice is hereby given to you as follows:

1. This notice concerns the trust deed described as follows:  
Trustor: .....  
Beneficiary: .....  
Recording information:  
Entry No.: .....  
Book No.: .....  
Page No.: .....

2. The undersigned claims to have fully paid or received satisfactory evidence of the payment in full of the obligation secured by the trust deed described above.

3. Unless, within sixty (60) days following the date stated above, the undersigned has received by certified mail, return receipt requested, directed to the address noted below a notice stating that you have not received payment in full of all obligations secured by the trust deed or that you otherwise object to reconveyance of the trust deed, the undersigned will fully release and reconvey the trust deed pursuant to chapter 12, title 45, Idaho Code.

4. A copy of the reconveyance or release of the trust deed is enclosed with this notice.

[Title insurer/Title agent]

[Address]

(2) Sixty (60) days shall elapse following the mailing, in the case of certified mail, or delivery, in the case of hand delivery, of the notice prescribed in subsection (1) of this section.

(3) If the title insurer or title agent has not upon expiration of that sixty (60) day period received any objection under section 45-1204, Idaho Code, the title insurer or title agent may then execute, acknowledge, and record a reconveyance of the trust deed in substantially the following form:

**RECONVEYANCE OF TRUST DEED**

[To be used concerning trust deeds as defined

in section 45-1502, Idaho Code]

....., a [Title insurer/Title agent] authorized to act in the State of Idaho does hereby, pursuant to chapter 27, title 41, Idaho Code, reconvey, without warranty, to the person or persons legally entitled thereto, the following trust property covered by a Trust Deed naming ..... as trustor, and ..... as beneficiary, which was recorded on ..... in Book ..... at Page ..... as Entry No. ....:

The following described property located in ..... County, State of Idaho:

[Property Description]

The undersigned title insurer/title agent hereby certifies as follows:

1. The undersigned title insurer/title agent has fully paid or received satisfactory evidence of the payment in full of the obligation secured by said Trust Deed.
2. Not less than thirty (30) days following the payment in full of said Trust Deed, the undersigned hand delivered or mailed by certified mail, return receipt requested, to the record beneficiary or a servicer for the record beneficiary under said Trust Deed at its record address a notice as required in section 45-1203(1), Idaho Code.
3. In excess of sixty (60) days elapsed after the mailing of said notice and no objection to said reconveyance has been received by the undersigned.

Dated .....

.....  
[Title insurer/Title agent]

[acknowledgment]

(4) A reconveyance of a trust deed, when executed and acknowledged in substantially the form prescribed in subsection (3) of this section shall be entitled to recordation and, when recorded, shall constitute a reconveyance of the trust deed identified therein, irrespective of any deficiency in the reconveyance procedure not disclosed in the release or reconveyance that is recorded other than forgery of the title insurer or title agent's signature. The



reconveyance of a trust deed pursuant to this chapter shall not itself discharge any personal obligation that was secured by the trust deed at the time of its reconveyance. [I.C., § 45-1203, as added by 1995, ch. 326, § 1, p. 1092.]

**Compiler's notes.** The words enclosed in brackets so appeared in the law as enacted.

Former § 45-1203 was repealed. See Compiler's Notes, § 45-1201.

**Satisfaction of Obligation.**

Only after the obligation secured by a deed of trust is satisfied is the deed reconveyed to the grantor. Defendant A v. Idaho State Bar, 132 Idaho 662, 978 P.2d 222 (1999).

**45-1204. Objections to reconveyances.** — The title insurer or title agent shall not record a reconveyance of a trust deed if, prior to the expiration of the sixty (60) day period specified in section 45-1203(2), Idaho Code, the title insurer or title agent receives a notice on behalf of the beneficiary or servicer stating that the trust deed continues to secure an obligation or otherwise objecting to reconveyance of the trust deed. [I.C., § 45-1204, as added by 1995, ch. 326, § 1, p. 1092.]

**Compiler's notes.** Former § 45-1204 was repealed. See Compiler's Notes, § 45-1201.

**45-1205. Liability of title insurance agent or underwriter.** — In the event that a trust deed is reconveyed by a title insurer or title agent purporting to act under the provisions of this chapter, but the obligation secured by the trust deed has not been fully paid, the title insurer or title agent effecting such reconveyance shall be liable to the beneficiary of the trust deed for the damages suffered as a result of such improper reconveyance only if the title insurer or title agent failed to substantially comply with the provisions of section 45-1203 or 45-1204, Idaho Code, or acted with negligence or in bad faith in reconveying the trust deed. [I.C., § 45-1205, as added by 1995, ch. 326, § 1, p. 1092.]

**Compiler's notes.** Former § 45-1205 was repealed. See Compiler's Notes, § 45-1201.

**45-1206. Payoffs prior to effective date.** — The reconveyance procedure prescribed in sections 45-1201 through 45-1205, Idaho Code, shall apply to obligations secured by trust deeds that were paid either prior to or following the effective date [July 1, 1995] of this section. [I.C., § 45-1206, as added by 1995, ch. 326, § 1, p. 1092.]

**Compiler's notes.** Section 2 of S.L. 1995, ch. 326 is compiled as § 45-1502.

## CHAPTER 13

GENERAL PROVISIONS RELATING TO ENFORCEMENT  
OF LIENS AND MORTGAGES

## SECTION.

45-1301. [Repealed.]

45-1302. Determination of all rights upon  
foreclosure proceedings.

## SECTION.

45-1303. Validation of former proceedings to  
quiet title.**45-1301. Foreclosure of chattel mortgages — Procedure. [Repealed.]****Compiler's notes.** This section comprising  
S.L. 1929, ch. 179, § 1, p. 317; I.C.A., § 44-  
1101, was repealed by S.L. 1967, ch. 161,§ 10-102, effective at midnight on December  
31, 1967. For present law see § 28-9-501.

**45-1302. Determination of all rights upon foreclosure proceedings.** — In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person, including parties mentioned in section 5-325, having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title. [1929, ch. 113, § 1, p. 182; I.C.A., § 44-1104; am. 1937, ch. 21, § 1, p. 32; am. 1967, ch. 272, § 21, p. 745.]

**Compiler's notes.** Section 5-325, referred to in this section, was repealed by S.L. 1975, ch. 242, § 1. For present rule see Idaho Rules of Civil Procedure, Rules 9(a), 10(a)(4) and 17(d).

Section 19 of S.L. 1967, ch. 272 is compiled as § 45-916, § 20 has been repealed and § 22 is compiled as § 49-401.

Section 32 of S.L. 1967, ch. 272 provided that this act become effective at midnight on December 31, 1967, simultaneously with the Uniform Commercial Code. Section 33 provided that instruments executed before such date could be enforced as if the amendment had not occurred.

**Sec. to sec. ref.** This chapter is referred to in § 42-1756.

## ANALYSIS

Determination of rights upon foreclosure.

Mandatory party.

Notice to interested parties.

**Determination of Rights upon Foreclosure.**

Upon foreclosure of a mortgage against real

estate subject to other liens, the trial court had jurisdiction to order the application of funds remaining after payment of the judgment of the mortgage holder to the satisfaction of such junior liens. *Credit Bureau v. Sleight*, 92 Idaho 210, 440 P.2d 143 (1968).

**Mandatory Party.**

The purchaser at an execution sale, who acquired the property after the materialman's lien arose but before foreclosure on the lien, must be named as a party in a foreclosure action by the holder of a materialman's lien to make the foreclosure action and subsequent foreclosure sale binding on that owner. *Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984).

**Notice to Interested Parties.**

This section does not enable a materialman to foreclose a lien as against other interested parties without giving them notice of the proceedings. *Bonner Bldg. Supply, Inc. v. Standard Forest Prods., Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984).



**45-1303. Validation of former proceedings to quiet title.** — All proceedings heretofore taken in any suit for the foreclosure of a mortgage or lien upon real property, and all judgments and decrees made, filed and docketed under such proceedings, and wherein the plaintiff, cross-complainant or plaintiff in intervention has quieted the title in such action or proceeding in conformity to the intent of section 45-1302, are hereby validated. [1929, ch. 113, § 2, p. 182; I.C.A., § 44-1105.]

**Compiler's notes.** Section 3 of S.L. 1929, ch. 113 declared an emergency. Approved March 5, 1929.

## CHAPTER 14

### PLEDGES

#### SECTION.

45-1401 — 45-1420. [Repealed.]

### 45-1401 — 45-1420. Pledges — Procedure. [Repealed.]

**Compiler's notes.** These sections comprising R.S., §§ 3410 — 3429; reen. R.C. & C.L., §§ 3421 — 3440; C.S., §§ 6388 — 6407; I.C.A., §§ 44-1201 — 44-1220; am. 1945, ch.

72, § 1, p. 95, were repealed by S.L. 1967, ch. 161, § 10-102, effective at midnight on December 31, 1967. For present law see §§ 28-9-203, 28-9-207, 28-9-305, 28-9-501.

## CHAPTER 15

### TRUST DEEDS

#### SECTION.

45-1501. [Repealed.]

45-1502. Definitions — Trustee's charge.

45-1503. Transfers in trust to secure obligation — Foreclosure.

45-1504. Trustee of trust deed — Who may serve — Successors.

45-1505. Foreclosure of trust deed, when.

45-1506. Manner of foreclosure — Notice — Sale.

45-1506A. Rescheduled sale — Original sale barred by stay — Notice of rescheduled sale.

45-1506B. Postponement of sale — Intervention of stay.

45-1507. Proceeds of sale — Disposition.

#### SECTION.

45-1508. Finality of sale.

45-1509. Trustee's deed — Form and contents.

45-1510. Trustee's deed — Recording — Effect.

45-1511. Request for copy of notice of default or notice of sale — Marginal recordation thereof.

45-1512. Money judgment — Action seeking balance due on obligation.

45-1513. Transfers and trusts are conveyances.

45-1514. Reconveyance upon satisfaction of obligation.

45-1515. Time limits for foreclosure.

### 45-1501. Declaration of policy. [Repealed.]

**Compiler's notes.** This section, which comprised 1957, ch. 181, § 1, p. 345, was repealed by S.L. 1967, ch. 118, § 1.

### 45-1502. Definitions — Trustee's charge. — As used in this act:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee.

(2) "Grantor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with this act and conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" means any right, title, interest and claim in and to real property owned by the grantor at the date of execution of the deed of trust or acquired thereafter by said grantor or his successors in interest. Provided, nevertheless, real property as so defined which may be transferred in trust under this act shall be limited to either (a) any real property located within an incorporated city or village at the time of the transfer, or (b) any real property not exceeding forty (40) acres, regardless of its location, and in either event where the trust deed states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this act relative to the power to make such transfer and trust and power of sale conferred in this act.

(6) The trustee shall be entitled to a reasonable charge for duties or services performed pursuant to the trust deed and this chapter, including compensation for reconveyance services notwithstanding any provision of a deed of trust prohibiting payment of a reconveyance fee by the grantor or beneficiary, or any provision of a deed of trust which limits or otherwise restricts the amount of a reconveyance fee to be charged and collected by the trustee. A trustee shall be entitled to refuse to reconvey a deed of trust until the trustee's reconveyance fees and recording costs for recording the reconveyance instruments are paid in full. The trustee shall not be entitled to a foreclosure fee in the event of judicial foreclosure or work done prior to the recording of a notice of default. If the default is cured prior to the time of the last newspaper publication of the notice of sale, the trustee shall be paid a reasonable fee. [1957, ch. 181, § 2, p. 345; am. 1967, ch. 118, § 2, p. 251; am. 1970, ch. 42, § 1, p. 89; am. 1983, ch. 190, § 1, p. 514; am. 1995, ch. 326, § 2, p. 1092; am. 1996, ch. 248, § 1, p. 783; am. 1997, ch. 387, § 1, p. 1242.]

**Compiler's notes.** The words "this act" refer to S.L. 1957, ch. 181 compiled as §§ 45-1501 — 45-1515, 45-901, 45-902, 45-904, 45-905, 45-907, 45-908 and 45-1003.

Section 2 of S.L. 1983, ch. 190 is compiled as § 45-1504.

Section 1 of S.L. 1995, ch. 326 is compiled as §§ 45-1201 to 45-1206.

Section 2 of S.L. 1997, ch. 387 declared an emergency. Approved March 24, 1997.

**Sec. to sec. ref.** This section is referred to in § 45-1506.

**Cited in:** *Ellis v. Butterfield*, 98 Idaho 644, 570 P.2d 1334 (1977); *Old Stone Capital Corp. v. John Hoene Implement Corp.*, 647 F. Supp. 916 (D. Idaho 1986); *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989).

#### ANALYSIS

Failure to include required statement.

Title search update.

Trust deed.

#### Failure to Include Required Statement.

Under Idaho law a trust deed which conveyed property exceeding 20 acres and did not contain the "statement" required by subdivision (5) of this section, would be treated as a mortgage, the creditor losing only the right to nonjudicial foreclosure and the shorter 120-day period of cure as opposed to one year post-foreclosure period of redemption. Because the trust deed would be recognized as a mortgage by Idaho law, its recordation is



constructive notice of the beneficiary's lien, which would protect its rights as against subsequent purchasers or encumbrancers. *Bear Lake W., Inc. v. Stock*, 36 Bankr. 413 (Bankr. D. Idaho 1984).

#### **Title Search Update.**

Neither the deed of trust under which the defendant title insurance company was trustee, nor this chapter, established a duty on the part of the defendant to provide updates on title searches made prior to transfer, and the verbal update was not given pursuant to the insurer's role as trustee; thus, any cause of action based upon negligence against the title insurer because of inaccuracy of the update was barred. *Brown's Tie & Lumber Co. v. Chicago Title Co.*, 115 Idaho 56, 764 P.2d 423 (1988).

#### **Trust Deed.**

A deed of trust conveys to the trustee noth-

ing more than a power of sale, capable of exercise upon the occurrence of certain contingencies (such as default in payment) and leaves in the trustor a legal estate comprised of all incidents of ownership which passes to the bankruptcy estate upon the filing of bankruptcy. *Long v. Williams*, 105 Idaho 585, 671 P.2d 1048 (1983).

Even though title passes for the purpose of the trust, a deed of trust is for practical purposes only a mortgage with power of sale. *Long v. Williams*, 105 Idaho 585, 671 P.2d 1048 (1983).

Although for practical purposes a deed of trust is only a mortgage with power of sale, title to the real estate does pass for the purpose of the trust, and legal title to the property is conveyed by the deed of trust to the trustee. *Defendant A v. Idaho State Bar*, 132 Idaho 662, 978 P.2d 222 (1999).

### **45-1503. Transfers in trust to secure obligation — Foreclosure. —**

(1) Transfers in trust of any estate in real property as defined in section 45-1502(5), Idaho Code, may hereafter be made to secure the performance of an obligation of the grantor or any other person named in the deed to a beneficiary. Where any transfer in trust of any estate in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security, and a deed of trust executed in conformity with this act may be foreclosed by advertisement and sale in the manner hereinafter provided, or, at the option of beneficiary, by foreclosure as provided by law for the foreclosure of mortgages on real property. If any obligation secured by a trust deed is breached, the beneficiary may not institute a judicial action against the grantor or his successor in interest to enforce an obligation owed by the grantor or his successor in interest unless:

(a) The trust deed has been foreclosed by advertisement and sale in the manner provided in this chapter and the judicial action is brought pursuant to section 45-1512, Idaho Code; or

(b) The action is one for foreclosure as provided by law for the foreclosure of mortgages on real property; or

(c) The beneficiary's interest in the property covered by the trust deed is substantially valueless as defined in subsection (2) of this section, in which case the beneficiary may bring an action against the grantor or his successor in interest to enforce the obligation owed by grantor or his successor in interest without first resorting to the security; or

(d) The action is one excluded from the meaning of "action" under the provisions of section 6-101(3), Idaho Code.

(2) As used in this section, "substantially valueless" means that the beneficiary's interest in the property covered by the trust deed has become valueless through no fault of the beneficiary, or that the beneficiary's interest in such property has little or no practical value to the beneficiary after taking into account factors such as the nature and extent of the estate

in real property which was transferred in trust; the existence of senior liens against the property; the cost to the beneficiary of satisfying or making current payments on senior liens; the time and expense of marketing the property covered by the deed of trust; the existence of liabilities in connection with the property for clean up of hazardous substances, pollutants or contaminants; and such other factors as the court may deem relevant in determining the practical value to the beneficiary of the beneficiary's interest in the real property covered by the trust deed.

(3) The beneficiary may bring an action to enforce an obligation owed by grantor or his successor in interest alleging that the beneficiary's interest in the property covered by the trust deed is substantially valueless without affecting the priority of the lien of the trust deed and without waiving his right to require the trust deed to be foreclosed by advertisement and sale and the beneficiary may, but shall not be required to, plead an alternative claim for foreclosure of the trust deed as a mortgage in the same action. If the court finds that the property is not substantially valueless, the beneficiary may seek judicial foreclosure of the trust deed, or he may dismiss the action and foreclose the trust deed by advertisement and sale in the manner provided in this chapter. If the court finds that the beneficiary's interest in the property covered by the trust deed is substantially valueless and enters a judgment upon the obligation, when that judgment becomes final the beneficiary shall execute a written request to the trustee to reconvey to the grantor or his successor in interest the estate in real property described in the trust deed. If the beneficiary obtains judgment on an obligation secured by a trust deed pursuant to subsection (1)(c) of this section, the lien of the judgment shall not relate back to the date of the lien of the trust deed. [1957, ch. 181, § 3, p. 345; am. 1967, ch. 118, § 3, p. 251; am. 1989, ch. 340, § 1, p. 861; am. 1993, ch. 281, § 2, p. 949.]

**Compiler's notes.** For words "this act" see Compiler's note, § 45-1502.

Section 1 of S.L. 1993, ch. 281 is compiled as § 6-101.

Section 4 of S.L. 1967, ch. 118 declared an emergency. Approved March 15, 1967.

Section 2 of S.L. 1989, ch. 340 declared an emergency. Approved April 5, 1989.

**Cross ref.** Foreclosure of mortgages, § 6-101 et seq.

**Sec. to sec. ref.** This section is referred to in § 6-101.

**Cited in:** *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989).

this section, will be subject to the law as announced in *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), while proceedings initiated upon or after April 5, 1989 will be subject to this section as amended. *Frazier v. Neilsen & Co.*, 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

The 1989 amendments to this section did not apply to a promissory note which was executed prior to the 1989 amendments. *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993).

#### —Legislative Intent.

The thrust of the legislative intent with regard to the 1989 amendment of this section is that where the obligation secured by a deed of trust is breached, the beneficiary may not institute a judicial action unless specific conditions are met, and this language hardly lends itself to the argument that the legislature meant for this section as amended to have retroactive effect upon existing actions. *Frazier v. Neilsen & Co.*, 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990).

#### ANALYSIS

Amendment of 1989.

—Legislative intent.

Bankruptcy.

Foreclosures.

Remedies.

Substantially valueless security.

#### Amendment of 1989.

Proceedings initiated before April 5, 1989, the effective date of the 1989 amendment to



**Bankruptcy.**

A deed of trust conveys to the trustee nothing more than a power of sale, capable of exercise upon the occurrence of certain contingencies (such as default in payment) and leaves in the trustor a legal estate comprised of all incidents of ownership which passes to the bankruptcy estate upon the filing of bankruptcy. *Long v. Williams*, 105 Idaho 585, 671 P.2d 1048 (1983).

**Foreclosures.**

By the 1957 Acts, No. 181, §§ 45-901 and 45-904 were amended to eliminate trust deeds from their operation and likewise the mortgage laws, directing attention to §§ 6-101 and 6-104 which were amended to draw a distinction between a trust deed or transfer in trust and a mortgage to the effect that mortgage foreclosure proceedings are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by chapter 181, such procedure being set out in this section, § 45-1505 also requiring the recording of the trust deed and any assignment thereof and § 45-1506 requiring notice of trustee sale, setting up details of the complete procedure for sale. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

Where beneficiaries of deed of trust opted for judicial foreclosure, rather than foreclosure by advertisement and sale, the court properly determined the amount of the deficiency judgment by proceeding under § 6-

108, rather than under § 45-1512. *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

**Remedies.**

This section is not to be interpreted as providing only two remedies, the exercise of power of sale and foreclosure, upon default where the obligation is secured by a deed of trust; if the statute was intended to provide exclusive remedies, it would have used mandatory "shall" language, rather than the permissive "may." *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), *aff'd*, 118 Idaho 104, 794 P.2d 1160 (1990).

**Substantially Valueless Security.**

No action can be maintained for the recovery on a promissory note secured by a deed of trust, unless the action is coupled with an action to foreclose the deed of trust, except where it is shown that the security has become substantially valueless. *First Interstate Bank v. Eisenbarth*, 123 Idaho 640, 853 P.2d 640 (Ct. App. 1993).

Bank was entitled to proceed directly against debtors where its interest in the property was rendered substantially valueless as defined in subsection (2) of this section. *First Interstate Bank v. Eisenbarth*, 123 Idaho 640, 853 P.2d 640 (Ct. App. 1993).

**Collateral References.** 54A Am. Jur. 2d, Mortgages, §§ 149-151.

59 C.J.S., Mortgages, §§ 20, 21.

**45-1504. Trustee of trust deed — Who may serve — Successors. —**

(1) The trustee of a trust deed under this act shall be:

- (a) Any member of the Idaho state bar;
- (b) Any bank or savings and loan association authorized to do business under the laws of Idaho or the United States;
- (c) Any corporation authorized to conduct a trust business under the laws of Idaho or the United States; or
- (d) A licensed title insurance agent or title insurance company authorized to transact business under the laws of the state of Idaho.

(2) In the event of death, dissolution, incapacity, disability or resignation of the trustee, the beneficiary may nominate in writing another qualified trustee. Provided, however, that the beneficiary may, for any reason obtain the resignation of the trustee by serving upon the trustee and the grantor in the deed of trust, at their last known address, a notice of intention to appoint a successor trustee. Said notice shall be given by registered or certified mail, and twenty (20) days after the date of mailing the notice of intention to appoint a successor trustee the beneficiary may nominate a successor trustee. Upon recording in the mortgage records of the county or counties in which the trust deed is recorded of the appointment of a successor trustee, the successor trustee shall be vested with all of the powers of the original trustee. Provided that a trustee may not be changed at the beneficiary's nomination after foreclosure has commenced by the filing of the notice of

default and is proceeding timely. [1957, ch. 181, § 4, p. 345; am. 1969, ch. 155, § 1, p. 482; am. 1983, ch. 190, § 2, p. 514.]

**Compiler's notes.** For words "this act" see Compiler's note, § 45-1502.

Sections 1 and 3 of S.L. 1983, ch. 190 are compiled as §§ 45-1502 and 45-1506, respectively.

Section 2 of S.L. 1969, ch. 155 declared an emergency. Approved March 14, 1969.

**Cited in:** Frontier Federal Sav. & Loan Ass'n v. Douglass, 123 Idaho 808, 853 P.2d 553 (1993).

**Collateral References.** Trustee's duty and liability under mortgage, deed of trust, or other instrument, to holders of obligations secured thereby. 90 A.L.R.2d 501.

**45-1505. Foreclosure of trust deed, when.** — The trustee may foreclose a trust deed by advertisement and sale under this act if:

(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; and

(3) The trustee or beneficiary shall have (a) filed for record in the office of the recorder in each county wherein the trust property, or some part or parcel, is situated, a notice of default identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation; and (b) mailed a copy of such notice by registered or certified mail, return receipt requested, to any person requesting such notice of record as provided in section 45-1511, Idaho Code. Service by mail in accordance with this subsection (3) shall be deemed effective at the time of mailing.

(4) No action, suit or proceeding has been instituted to recover the debt then remaining secured by the trust deed, or any part thereof, or if such action or proceeding has been instituted, the action or proceeding has been dismissed. [1957, ch. 181, § 5, p. 345; am. 1990, ch. 401, § 1, p. 1122.]

**Legislative Intent.** Section 5 of S.L. 1990, ch. 401 read: "The legislature finds and declares that the following referred to amendatory provisions contained in this act are merely clarifications of existing law and are not intended to be and are declared not to be changes in existing law:

"a. The sentence added to subsection (3) of section 45-1505, Idaho Code;

"b. The changes reflected in subsections (2)(a), in the first phrase of subsection (2)(b), in subsection (13) and added subsection (14) of section 45-1506, Idaho Code;

"c. The changes reflected in Section 4 [§ 45-1510] of this act; and

"d. Various mere semantical changes and corrections of obvious grammatical and typographical errors."

**Compiler's notes.** For words "this act" see Compiler's note, § 45-1502.

**Sec. to sec. ref.** This section is referred to in §§ 8-601A, 45-1508 and 45-1510.

**Cited in:** Security Pac. Fin. Corp. v. Bishop, 109 Idaho 25, 704 P.2d 357 (Ct. App. 1985).

#### ANALYSIS

**Construction.**

Delay of foreclosure sale.

Notice of trustee's sale.



**Procedure.**

Suit to recover debt.

—Dismissal.

—Exhausting security.

—Prohibition of foreclosure.

—Waiver of security.

**Construction.**

The references in §§ 45-1508 and 45-1510 are to be read as references to § 45-1506 instead of this section, the references to the latter section obviously being clerical errors or misprints such as this court has repeatedly held should be corrected. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

This section and § 45-1512 are in *pari materia* and must be construed together. *Frontier Federal Sav. & Loan Ass'n v. Douglass*, 123 Idaho 808, 853 P.2d 553, cert. denied, 510 U.S. 917, 114 S. Ct. 309, 126 L. Ed. 2d 257, 1993.

**Delay of Foreclosure Sale.**

Where a deed of trust, which was drafted by counsel for plaintiff, specifically granted defendant trustee the power to delay the foreclosure sale and recognized its statutorily imposed notice obligations as trustee, the action of the defendant, in delaying the scheduled foreclosure sale after discovering a previously unknown trust deed, was necessary to clear that trust deed from title at the judicial sale, and therefore was a proper exercise of its powers as trustee and could not form the basis for an insurer's bad faith claim. *Brown's Tie & Lumber Co. v. Chicago Title Co.*, 115 Idaho 56, 764 P.2d 423 (1988).

**Notice of Trustee's Sale.**

A beneficiary was not precluded from recovering a statutory deficiency judgment allowed by § 45-1512 by waiver or estoppel because the notice of trustee's sale stated that "the beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation." *Frontier Federal Sav. & Loan Ass'n v. Douglass*, 123 Idaho 808, 853 P.2d 553, cert. denied, 510 U.S. 917, 114 S. Ct. 309, 126 L. Ed. 2d 257, 1993.

**Procedure.**

By the 1957 Acts, No. 181, §§ 45-901 and 45-904 were amended to eliminate trust deeds from their operation and likewise the mortgage laws, directing attention to §§ 6-101 and 6-104 which were amended to draw a distinction between a trust deed or transfer in trust and a mortgage to the effect that mortgage foreclosure proceedings are not applicable to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as

authorized by chapter 181, such procedure being set out in § 45-1503, this section also requiring the recording of the trust deed and any assignment thereof and § 45-1506 requiring notice of trustee sale, setting up details of the complete procedure for sale. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

**Suit to Recover Debt.****—Dismissal.**

Subdivision (4) provides that if the suit upon the debt is dismissed, foreclosure may again be made of the trust deed; if, during the suit on the debt, the property covered by the trust deed has been conveyed or encumbered by the debtor, any revival of the security of the trust deed upon dismissal of the suit on the debt as provided in subdivision (4) shall be subject to any such conveyance or encumbrance. *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), *aff'd*, 118 Idaho 104, 794 P.2d 1160 (1990).

**—Exhausting Security.**

Holders of a promissory note secured by a deed of trust encumbering real property may sue for a money judgment on the note without first exhausting their security by judicial foreclosure or by exercise of the power of sale. *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), *aff'd*, 118 Idaho 104, 794 P.2d 1160 (1990).

**—Prohibition of Foreclosure.**

Section prohibited holders of promissory note secured by a deed of trust from prevailing on their complaint which asked for judgment upon the debt and judgment to foreclose the deed of trust. Subsection (4) provides that the summary foreclosure procedure cannot be utilized if judicial process is being used to recover the debt; such language does not prohibit the collection of a debt without foreclosure of the trust deed, but does prohibit foreclosure if there is an action on the debt pending. *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), *aff'd*, 118 Idaho 104, 794 P.2d 1160 (1990).

**—Waiver of Security.**

In subdivision (4) of this statute, the legislature contemplated a suit on debt independent of foreclosure provisions; if the creditor files suit to recover on the debt without first foreclosing on the security as provided by the statute, the security, as a matter of law, is waived at the time the action on the debt is filed. *Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989), *aff'd*, 118 Idaho 104, 794 P.2d 1160 (1990).

**45-1506. Manner of foreclosure — Notice — Sale.** — (1) A trust deed may be foreclosed in the manner provided in this section.

(2) Subsequent to recording notice of default as hereinbefore provided, and at least one hundred twenty (120) days before the day fixed by the trustee for the trustee's sale, notice of such sale shall be given by registered or certified mail, return receipt requested, to the last known address of the following persons or their legal representatives, if any:

(a) The grantor in the trust deed and any person requesting notice of record as provided in section 45-1511, Idaho Code.

(b) Any successor in interest of the grantor (including, but not limited to, a grantee, transferee or lessee) whose interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such interest.

(c) Any person having a lien or interest subsequent to the interest of the trustee in the trust deed where such lien or interest appears of record prior to the recording of the notice of default, or where the trustee or the beneficiary has actual notice of such lien or interest.

(3) The disability, insanity or death of any person to whom notice of sale is to be given under subsection (2) of this section shall not delay or impair in any way the trustee's right under a trust deed to proceed with a sale under such deed, provided the notice of sale required under subsection (2) of this section has been mailed as provided by law for service of summons upon incompetents or to the administrator or executor of the estate of such person.

(4) The notice of sale shall set forth:

(a) The names of the grantor, trustee and beneficiary in the trust deed.

(b) A description of the property covered by the trust deed.

(c) The book and page of the mortgage records or the recorder's instrument number where the trust deed is recorded.

(d) The default for which the foreclosure is made.

(e) The sum owing on the obligation secured by the trust deed.

(f) The date, time and place of the sale which shall be held at a designated time after 9:00 a.m. and before 4:00 p.m., Standard Time, and at a designated place in the county or one of the counties where the property is located.

(5) At least three (3) good faith attempts shall be made on different days over a period of not less than seven (7) days each of which attempts must be made at least thirty (30) days prior to the day of the sale to serve a copy of the notice of sale upon an adult occupant of the real property in the manner in which a summons is served. At the time of each such attempt, a copy of the notice of sale shall be posted in a conspicuous place on the real property unless the copy of the notice of sale previously posted remains conspicuously posted. Provided, however, that if during such an attempt personal service is made upon an adult occupant and a copy of the notice is posted, then no further attempt at personal service and no further posting shall be required. Provided, further, that if the adult occupant personally served is a person to whom the notice of sale was required to be mailed (and was mailed) pursuant to the foregoing subsections of this section, then no posting of the notice of sale shall be required.

(6) A copy of the notice of sale shall be published in a newspaper of general circulation in each of the counties in which the property is situated



once a week for four (4) successive weeks, making four (4) publishings in all, with the last publication to be at least thirty (30) days prior to the day of sale.

(7) An affidavit of mailing notice of sale and an affidavit of posting (when required) and publication of notice of sale as required by subsection (6) of this section shall be recorded in the mortgage records in the counties in which the property described in the deed is situated at least twenty (20) days prior to the date of sale.

(8) The sale shall be held on the date and at the time and place designated in the notice of sale or notice of rescheduled sale as provided in section 45-1506A, Idaho Code, unless the sale is postponed as provided in this subsection or as provided in section 45-1506B, Idaho Code, respecting the effect of an intervening stay or injunctive relief order. The trustee shall sell the property in one parcel or in separate parcels at auction to the highest bidder. Any person, including the beneficiary under the trust deed, may bid at the trustee's sale. The attorney for such trustee may conduct the sale and act in such sale as the auctioneer of trustee. The trustee may postpone the sale of the property upon request of the beneficiary by publicly announcing at the time and place originally fixed for the sale, the postponement to a stated subsequent date and hour. No sale may be postponed to a date more than thirty (30) days subsequent to the date from which the sale is postponed. A postponed sale may itself be postponed in the same manner and within the same time limitations as provided in this subsection.

(9) The purchaser at the sale shall forthwith pay the price bid and upon receipt of payment the trustee shall execute and deliver the trustee's deed to such purchaser, provided that in the event of any refusal to pay purchase money, the officer making such sale shall have the right to resell or reject any subsequent bid as provided by law in the case of sales under execution.

(10) The trustee's deed shall convey to the purchaser the interest in the property which the grantor had, or had the power to convey, at the time of the execution by him of the trust deed together with any interest the grantor or his successors in interest acquired after the execution of such trust deed.

(11) The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following the sale, and any persons remaining in possession thereafter under any interest except one prior to the deed of trust shall be deemed to be tenants at sufferance.

(12) Whenever all or a portion of any obligation secured by a deed of trust which has become due by reason of a default of any part of that obligation, including taxes, assessments, premiums for insurance or advances made by a beneficiary in accordance with the terms of the deed of trust, the grantor or his successor in interest in the trust property or any part thereof, or any beneficiary under a subordinate deed of trust or any person having a subordinate lien or encumbrance of record thereon, at any time within one hundred fifteen (115) days of the recording of the notice of default under such deed of trust, if the power of sale therein is to be exercised, or otherwise at any time prior to the entry of a decree of foreclosure, may pay to the beneficiary or their successors in interest, respectively, the entire amount then due under the terms of the deed of trust and the obligation secured

thereby (including costs and expenses actually incurred in enforcing the terms of such obligation and a reasonable trustee's fee subject to the limitations imposed by subsection (6) of section 45-1502, Idaho Code, and attorney's fees as may be provided in the promissory note) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust shall be reinstated and shall be and remain in force and effect, the same as if no acceleration had occurred.

(13) Any mailing to persons outside the United States and its territories required by this chapter may be made by ordinary first class mail if certified or registered mail service is unavailable.

(14) Service by mail in accordance with the provisions of this section shall be deemed effective at the time of mailing. [1957, ch. 181, § 6, p. 345; am. 1967, ch. 74, § 1, p. 170; am. 1983, ch. 190, § 3, p. 514; am. 1990, ch. 401, § 2, p. 1122.]

**Legislative Intent.** Section 5 of S.L. 1990, ch. 401 read: "The legislature finds and declares that the following referred to amendatory provisions contained in this act are merely clarifications of existing law and are not intended to be and are declared not to be changes in existing law:

"a. The sentence added to subsection (3) of section 45-1505, Idaho Code;

"b. The changes reflected in subsections (2)(a), in the first phrase of subsection (2)(b), in subsection (13) and added subsection (14) of section 45-1506, Idaho Code;

"c. The changes reflected in Section 4 [§ 45-1510] of this act; and

"d. Various mere semantical changes and corrections of obvious grammatical and typographical errors."

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1983, ch. 190 is compiled as § 45-1504.

Section 3 of S.L. 1990, ch. 401 is compiled as § 45-1508.

**Sec. to sec. ref.** This section is referred to in § 45-1506B.

**Cited in:** Ellis v. Butterfield, 98 Idaho 644, 570 P.2d 1334 (1977); Security Pac. Fin. Corp. v. Bishop, 109 Idaho 25, 704 P.2d 357 (Ct. App. 1985); Young v. Washington Fed. Sav. & Loan Ass'n, 156 Bankr. 282 (Bankr. D. Idaho 1993); Frontier Federal Sav. & Loan Ass'n v. Douglass, 123 Idaho 808, 853 P.2d 553 (1993); Wilhelm v. Johnston, 136 Idaho 145, 30 P.3d 300 (Ct. App. 2001).

#### ANALYSIS

Costs recoverable by beneficiary.

Curing default.

Injunction against foreclosure.

Procedure.

Sectional references.

Simultaneous foreclosure.

#### Costs Recoverable by Beneficiary.

Expenses of the trustee's sale, including a reasonable charge by the trustee and a reasonable attorney's fee incurred up to the time of sale, interest accrued from the date of sale to the date of judgment at the rate provided in the promissory note, and costs of the action for a deficiency and reasonable attorney fees incurred in the action were recoverable by the beneficiary in an action to obtain a deficiency judgment. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

#### Curing Default.

A tender of money to cure a default under subsection (12) of this section, which would usually be indispensable, is not required when its futility is shown; however, the fact that a bank manager had stated that he would have to check to see if a payment curing the default could be accepted was not enough, standing alone, to establish that an actual tender would have been futile. *Owens v. Idaho First Nat'l Bank*, 103 Idaho 465, 649 P.2d 1221 (Ct. App.), cert. denied, 116 Idaho 466, 776 P.2d 828 (1982).

In order to constitute a valid tender of money, the law requires an actual, present, physical offer and a mere spoken offer to pay does not qualify as a valid tender; therefore, where an agent for property owners, whose property was to be sold after they defaulted on a note to a bank, only made an oral offer to cure the default in a phone conversation with the bank manager, the offer did not constitute a valid tender. *Owens v. Idaho First Nat'l Bank*, 103 Idaho 465, 649 P.2d 1221 (Ct. App.), cert. denied, 116 Idaho 466, 776 P.2d 828 (1982).



Agreement between the parties did not merely provide that the sale would be postponed; it eliminated the default by altering the terms of the promissory note so that there were no longer any sums past due. *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002).

#### **Injunction Against Foreclosure.**

If plaintiff had produced money and defendant had refused to accept the amount, an injunction to stay foreclosure would have been in order; however, where there was no evidence that there was an actual production or delivery of money coupled with plaintiff's offer to pay, an injunction against foreclosure was properly denied. Statement of defendant that the entire balance of the deed of trust was due was not sufficient to constitute a refusal thus excusing plaintiff from making a valid tender in order to avoid foreclosure of deed of trust. *Allied Invs., Inc. v. Dunn*, 104 Idaho 764, 663 P.2d 300 (1983).

#### **Procedure.**

By the 1957 Acts, No. 181, §§ 45-901 and 45-904 were amended to eliminate trust deeds from their operation and likewise the mortgage laws, directing attention to §§ 6-101 and 6-104 which were amended to draw a distinction between a trust deed or transfer in trust and a mortgage to the effect that mortgage foreclosure proceedings are not applica-

ble to proceedings for the foreclosure of a trust deed by advertisement or notice and sale as authorized by chapter 181, such procedure being set out in §§ 45-1503, 45-1505 also requiring the recording of the trust deed and any assignment thereof and this section requiring notice of trustee sale, setting up details of the complete procedure for sale. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

#### **Sectional References.**

The references in §§ 45-1508 and 45-1510 are to be read as references to this section instead of § 45-1505, the references to the latter section obviously being clerical errors or misprints such as this court has repeatedly held should be corrected. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

#### **Simultaneous Foreclosure.**

Where acceptable to the mortgagees, there is no impediment to ordering a simultaneous foreclosure; the foreclosure sale would result in each party being reimbursed by priority to the extent of the proceeds, neither would receive a redemption right, and each would receive a deficiency to the extent his or her debt was not satisfied, with appropriate credit being given for the reasonable value of the security. *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

**45-1506A. Rescheduled sale — Original sale barred by stay — Notice of rescheduled sale.** — (1) In the event a sale cannot be held at the time scheduled by reason of automatic stay provisions of the U.S. bankruptcy code (11 U.S.C. 362), or a stay order issued by any court of competent jurisdiction, then the sale may be rescheduled and conducted following expiration or termination of the effect of the stay in the manner provided in this section.

(2) Notice of the rescheduled sale shall be given at least thirty (30) days before the day of the rescheduled sale by registered or certified mail to the last known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code, provided that recording the request prior to notice of default is, for the purposes of this section only, waived.

(3) Notice of the rescheduled sale shall be published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publishings in all, with the last publication to be at least ten (10) days prior to the day of sale.

(4) The trustee shall make an affidavit stating that he or she has complied with subsections (2) and (3) of this section. The trustee shall make the above affidavit available for inspection at the time of the rescheduled sale together with any affidavit of mailing and posting, when required, which was not of record as required by subsection (7) of section 45-1506,

Idaho Code, when the stay became effective. The affidavit or affidavits shall be attached to or incorporated in the trustee's deed. [I.C., § 45-1506A, as added by 1983, ch. 190, § 4, p. 514; am. 1987, ch. 166, § 1, p. 326.]

**Cited in:** *Young v. Washington Fed. Sav. & Loan Ass'n*, 156 Bankr. 282 (Bankr. D. Idaho 1993); *In re Guth*, — Bankr. — (Bankr. D. Idaho Nov. 8, 2002).

**45-1506B. Postponement of sale — Intervention of stay.** — (1) If a stay as set out in subsection (1) of section 45-1506A, Idaho Code, which would otherwise have stopped a foreclosure sale is terminated or lifted prior to the date of sale, then any person having a right to reinstate the deed of trust pursuant to subsection (12) of section 45-1506, Idaho Code, may request the trustee to postpone the sale for a period of time which shall allow at least one hundred fifteen (115) days to elapse from the recording of the notice of default to the rescheduled date of sale exclusive of the period of time during which such stay was in effect.

(2) Written request for postponement must be served upon the trustee prior to the time set for the original sale.

(3) If the foreclosure has proceeded in compliance with all requirements of subsections (2) through and including (6), of section 45-1506, Idaho Code, prior to the intervention of the stay, then at the time appointed for the original sale, the trustee shall announce the date and time of the rescheduled sale to be conducted at the place originally scheduled and no further or additional notice of any kind shall be required.

(4) If the foreclosure has proceeded in compliance with subsections (2) through and including (5), of section 45-1506, Idaho Code, prior to the intervention of the stay, then the foreclosure process may be resumed if timely compliance can be had with publication of the original notice of sale under subsection (6) of section 45-1506, Idaho Code. If timely compliance under subsection (6) of section 45-1506, Idaho Code, is not possible, the partially completed foreclosure process shall be discontinued and any further sale proceeding shall require new compliance with all notice of sale procedures as provided in section 45-1506, Idaho Code.

(5) Nothing in this section shall be construed to create a right to cure the default and reinstate the deed of trust under subsection (12) of section 45-1506, Idaho Code, for a period of time longer than one hundred fifteen (115) days from the recording of the notice of default exclusive of the time during which a stay is in effect and if no request is made to postpone the sale under the circumstances provided in this section, the computation of time under this chapter shall be deemed unaffected by any intervening stay. [I.C., § 45-1506B, as added by 1983, ch. 190, § 5, p. 514.]

**Compiler's notes.** Section 6 of S.L. 1983, ch. 190 declared an emergency. Approved April 9, 1983.

**Cited in:** *Young v. Washington Fed. Sav. & Loan Ass'n*, 156 Bankr. 282 (Bankr. D. Idaho 1993).

**Sec. to sec. ref.** This section is referred to in § 45-1506.

**45-1507. Proceeds of sale — Disposition.** — The trustee shall apply the proceeds of the trustee's sale as follows:



(1) To the expenses of the sale, including a reasonable charge by the trustee and a reasonable attorney's fee.

(2) To the obligation secured by the trust deed.

(3) To any persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear.

(4) The surplus, if any, to the grantor of the trust deed or to his successor in interest entitled to such surplus. [1957, ch. 181, § 7, p. 345.]

#### ANALYSIS

Costs recoverable by beneficiary.

Deficiency.

#### Costs Recoverable by Beneficiary.

Expenses of the trustee's sale, including a reasonable charge by the trustee and a reasonable attorney's fee incurred up to the time of sale, interest accrued from the date of sale to the date of judgment at the rate provided in the promissory note, and costs of the action for a deficiency and reasonable attorney fees incurred in the action were recoverable by the beneficiary in an action to obtain a deficiency

judgment. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

#### Deficiency.

The statute provides that a debtor is entitled to any surplus of actual proceeds from a trustee's sale after the expenses of the sale, the obligations secured by the deed of trust, and any subordinate liens have been satisfied, but there is no corresponding provision for an award to the debtor measured by the excess of fair market value over the secured debt. *Wilhelm v. Johnston*, 136 Idaho 145, 30 P.3d 300 (Ct. App. 2001).

**45-1508. Finality of sale.** — A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof. [1957, ch. 181, § 8, p. 345; am. 1990, ch. 401, § 3, p. 1122.]

**Legislative Intent.** Section 5 of S.L. 1990, ch. 401 read: "The legislature finds and declares that the following referred to amendatory provisions contained in this act are merely clarifications of existing law and are not intended to be and are declared not to be changes in existing law:

"a. The sentence added to subsection (3) of section 45-1506, Idaho Code;

"b. The changes reflected in subsections (2)(a), in the first phrase of subsection (2)(b), in subsection (13) and added subsection (14) of section 45-1506, Idaho Code;

"c. The changes reflected in Section 4 [§ 45-1510] of this act; and

"d. Various mere semantical changes and corrections of obvious grammatical and typographical errors."

**Compiler's notes.** For words "this act" see Compiler's note, § 45-1502.

Sections 2 and 4 of S.L. 1990, ch. 401 are compiled as §§ 45-1506 and 45-1510, respectively.

**Cited in:** *Bear Lake W., Inc. v. Stock*, 36 Bankr. 413 (Bankr. D. Idaho 1984).

#### ANALYSIS

Bankruptcy.

Claims against mortgagor's successor.

Constitutionality.

Discharge of security interest.

Equitable remedies.

Good faith purchaser.

Sectional references.

#### Bankruptcy.

Where prior to the commencement of bankruptcy proceedings, a purchaser at a trust deed sale was an entity under a specific local law against whom a subsequent bona fide

purchaser could not perfect an interest, notwithstanding the provisions of the general recording laws, the rights of purchaser of bankrupt debtor's residence, as of the time of the sale, could not be avoided under § 544 (a) (3) of the Bankruptcy Code (11 U.S.C. § 544 (a) (3)). *Young v. Washington Fed. Sav. & Loan Ass'n*, 156 Bankr. 282 (Bankr. D. Idaho 1993).

Bankruptcy court agreed with the creditor and found that the debtors' interest in the residence was effectively and completely foreclosed by the foreclosure sale, pursuant to § 45-1508, and the debtors could not use the status of a hypothetical bona fide purchaser under 11 U.S.C.S. § 544(a)(3) to defeat the creditor's interest as a successful purchaser of the debtors' residence at the foreclosure sale; the automatic stay was annulled. *In re Jay*, — Bankr. — (Bankr. D. Idaho Dec. 31, 2002).

#### **Claims Against Mortgagor's Successor.**

A mortgagee is not precluded from suing to collect the entire debt secured by a mortgage where the debt was not due and where there was no basis to foreclose the mortgage at the time the property was sold to a third party by the trustee of prior deeds of trust for less than the fair market value of the property. *Idaho Power Co. v. Benj. Houseman Co.*, 123 Idaho 674, 851 P.2d 970 (1993).

#### **Constitutionality.**

The statutory right of redemption, following an execution sale of real property, given by §§ 11-310, 11-401, 11-402 and following judicial foreclosure of a mortgage, given by § 6-101 is expressly denied to the grantor in a trust deed by this section where the sale is made by the trustee by notice and sale, or advertisement and sale, pursuant to the power contained in the deed and the applicable portions of said chapter 15 of title 45. The legislative withdrawal of this legislatively given right of redemption is not a denial of

due process, where the withdrawal is effected only in cases where the property owner by his contract so agrees. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958).

#### **Discharge of Security Interest.**

Although the seller of various items of fruit packing machinery had retained a security interest to secure the purchase price, a subsequent foreclosure sale of the real property to which the machinery was affixed discharged the security interest held by the seller of the machinery, where the purchase at the foreclosure sale of the real estate and fruit packing machinery was in good faith. *Northwest Equip. Sales Co. v. Western Packers, Inc.*, 623 F.2d 92 (9th Cir. 1980).

#### **Equitable Remedies.**

Although this section prevents the purchaser from redeeming the property sold, it does not prevent equity from ordering compensation to the vendor for her conveyance of the property. *Pichon v. L.J. Broekemeier, Inc.*, 108 Idaho 846, 702 P.2d 884 (Ct. App.), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

#### **Good Faith Purchaser.**

Bidder was not a good faith purchaser because the foreclosure sale was void for failure to comply with § 45-1505(2); and the bidder was not a good faith purchaser for value because he did not acquire title to the real property. *Taylor v. Just*, 138 Idaho 137, 59 P.3d 308 (2002).

#### **Sectional References.**

The references in this section and § 45-1510 are to be read as references to § 45-1506 instead of § 45-1505, the references to the latter section obviously being clerical errors or misprints such as this court has repeatedly held should be corrected. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958) (decision prior to 1990 amendment).

**45-1509. Trustee's deed — Form and contents.** — (1) The trustee's deed to the purchaser at the trustee's sale under this act shall conform to the requirements of subsection (2) of this section.

(2) The trustee's deed shall contain, in addition to a description of the property conveyed, a recital of the facts concerning the default, the mailing and the publication of the notice of sale, the conduct of the sale and the receipt of the purchase money from the purchaser. [1957, ch. 181, § 9, p. 345.]

**Compiler's notes.** For words "this act" see Compiler's note, § 45-1502.

**45-1510. Trustee's deed — Recording — Effect.** — When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the



affidavits required under section 45-1506, subsection (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof. [1957, ch. 181, § 10, p. 345; am. 1990, ch. 401, § 4, p. 1122.]

**Legislative Intent.** Section 5 of S.L. 1990, ch. 401 read: "The legislature finds and declares that the following referred to amendatory provisions contained in this act are merely clarifications of existing law and are not intended to be and are declared not to be changes in existing law:

"a. The sentence added to subsection (3) of section 45-1505, Idaho Code;

"b. The changes reflected in subsections (2)(a), in the first phrase of subsection (2)(b), in subsection (13) and added subsection (14) of section 45-1506, Idaho Code;

"c. The changes reflected in Section 4

[§ 45-1510] of this act; and

"d. Various mere semantical changes and corrections of obvious grammatical and typographical errors."

#### **Sectional References.**

The references in § 45-1508 and this section are to be read as references to § 45-1506 instead of § 45-1505, the references to the latter section obviously being clerical errors or misprints such as this court has repeatedly held should be corrected. *Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958) (decision prior to 1990 amendment).

**45-1511. Request for copy of notice of default or notice of sale — Marginal recordation thereof.** — Any person desiring a copy of any notice of default or any notice of sale under a deed of trust, as hereinbefore provided, at any time subsequent to the recordation of such deed of trust and prior to the recording of notice of default thereunder, may cause to be filed for record in the office of the recorder of the county or counties in which any part or parcel of the real property is situated a duly acknowledged request for a copy of any such notice of sale or default showing service upon such trustee. The request shall set forth the name and address of the person requesting copies of such notice or notices and shall identify the deed of trust by stating the names of the parties thereto, the date of recordation and the book and page where the same is recorded and the recorder's instrument number. The recorder shall immediately enter on the margin of the record of the deed of trust therein referred to that such request is recorded at a certain book and page in the records of his office; no request or any statement therein contained or the record thereof shall affect the title to said property or be deemed notice to any person that any person so recording such request has any right, title or interest in or lien or charge upon the property in the deed of trust referred to therein. [1957, ch. 181, § 11, p. 345.]

**Sec. to sec. ref.** This section is referred to in §§ 45-1506 and 45-1506A.

#### **Rights and Duties of Creditor.**

Holders of a promissory note, secured by a deed of trust, had a right to sue on their note, and this right was unaffected by the fact that they did not notify the county recorder of their

interest in bank's foreclosure proceedings; this section indicates that a creditor has no "duty" to keep informed of a pending foreclosure action, and the wording of the statute reveals that a creditor has a right, not an obligation, to be notified of a foreclosure sale. *Tanner v. Shearmire*, 115 Idaho 1060, 772 P.2d 267 (Ct. App. 1989).

**45-1512. Money judgment — Action seeking balance due on obligation.** — At any time within 3 months after any sale under a deed of trust, as hereinbefore provided, a money judgment may be sought for the balance due upon the obligation for which such deed of trust was given as security,

and in such action the plaintiff shall set forth in his complaint the entire amount of indebtedness which was secured by such deed of trust and the amount for which the same was sold and the fair market value at the date of sale, together with interest from such date of sale, costs of sale and attorney's fees. Before rendering judgment the court shall find the fair market value of the real property sold at the time of sale. The court may not render judgment for more than the amount by which the entire amount of indebtedness due at the time of sale exceeds the fair market value at that time, with interest from date of sale, but in no event may the judgment exceed the difference between the amount for which such property was sold and the entire amount of the indebtedness secured by the deed of trust. [1957, ch. 181, § 12, p. 345.]

**Cited in:** Snake River Equip. Co. v. Christensen, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984).

#### ANALYSIS

Action on debt independent of foreclosure.

Applicability.

—Time limitation.

Construction.

Costs recoverable by beneficiary.

Fair market value.

Judicial foreclosure.

Notice of trustee's sale.

Obligation on deficiency not discharged.

Property owner's opinion as to value.

Purchase offer by third party.

Simultaneous foreclosure.

Sufficient proof of value.

Waiver of defense.

#### Action on Debt Independent of Foreclosure.

Holders of a promissory note, secured by a deed of trust, were not precluded from obtaining a judgment on their note because the total indebtedness owed by the makers at the time of their default did not exceed the fair market value of the property at the time of the foreclosure sale; this section deals with deficiency actions by a creditor whose debts have been partially satisfied by foreclosure proceedings, and does not affect a creditor's independent action to recover this indebtedness owed on the debtor's promissory note. *Tanner v. Shearmire*, 115 Idaho 1060, 772 P.2d 267 (Ct. App. 1989).

#### Applicability.

This section affords no authority for the proposition that the holder of an unrecorded second deed of trust on a building secured as collateral should receive the protection of the antideficiency statute when he is sued on a guaranty agreement by which he has given a personal guaranty on the loan taken by a corporation for construction of the building. *First Sec. Bank v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988).

This section applies to claims by a creditor secured by a deed of trust for the balance due after a deed of trust sale; the protection is given to the borrower-grantor who gives the security interest described in the deed of trust, but not to guarantors. *First Sec. Bank v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988).

Supreme Court has determined that the protection in this section extends only to the borrower-grantor who gives the security interest in deed of trust. *Willis v. Realty Country, Inc.*, 121 Idaho 312, 824 P.2d 887 (Ct. App. 1991).

#### —Time Limitation.

Holders of a promissory note secured by a deed of trust, who sued for a money judgment on the note, were not subject to the statutory limitations applicable to a deficiency action following foreclosure; the time limit provided for in this section applies to deficiency actions resulting from foreclosure sales; it does not apply to a creditor's action on the debt which is independent of any foreclosure proceedings; under these circumstances, a creditor has five years in which to bring an action upon his promissory note, as provided for in § 5-216. *Tanner v. Shearmire*, 115 Idaho 1060, 772 P.2d 267 (Ct. App. 1989).

#### Construction.

The "difference" contemplated by this section is obviously that created where property is sold at a foreclosure sale to a beneficiary or other purchaser at a price which is less than the balance of the indebtedness secured by the deed of trust being foreclosed. *Alpine Villa Dev. Co. v. Young*, 99 Idaho 851, 590 P.2d 578 (1979).

Section 45-1505 and this section are in pari materia and must be construed together. *Frontier Federal Sav. & Loan Ass'n v. Douglass*, 123 Idaho 808, 853 P.2d 553, cert. denied, 510 U.S. 917, 114 S. Ct. 309, 126 L. Ed. 2d 257, 1993.

#### Costs Recoverable by Beneficiary.

Expenses of the trustee's sale, including a reasonable charge by the trustee and a rea-



sonable attorney's fee incurred up to the time of sale, interest accrued from the date of sale to the date of judgment at the rate provided in the promissory note, and costs of the action for a deficiency and reasonable attorney fees incurred in the action were recoverable by the beneficiary in an action to obtain a deficiency judgment. *Farber v. Howell*, 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986).

#### **Fair Market Value.**

The district court was correct in not accepting construction cost as the equivalent of fair market value in a suit for a deficiency judgment following a nonjudicial foreclosure sale of property subject to a deed of trust. *Logan v. Grand Junction Assocs.*, 111 Idaho 670, 726 P.2d 782 (Ct. App. 1986).

The district court committed reversible error in holding that the plaintiffs failed in their burden to prove a deficiency because the experts were unable to agree on a particular figure; the district court must reconsider, compare and weigh the evidence as a fact finder and determine the fair market value of the property in question. *Logan v. Grand Junction Assocs.*, 111 Idaho 670, 726 P.2d 782 (Ct. App. 1986).

#### **Judicial Foreclosure.**

Where beneficiaries of deed of trust opted for judicial foreclosure, rather than foreclosure by advertisement and sale, the court properly determined the amount of the deficiency judgment by proceeding under § 6-108, rather than under this section. *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Ct. App. 1984).

#### **Notice of Trustee's Sale.**

A beneficiary was not precluded from recovering a statutory deficiency judgment allowed by this section by waiver or estoppel because the notice of trustee's sale stated that "the beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation." *Frontier Federal Sav. & Loan Ass'n v. Douglass*, 123 Idaho 808, 853 P.2d 553, cert. denied, 510 U.S. 917, 114 S. Ct. 309, 126 L. Ed. 2d 257, 1993.

#### **Obligation on Deficiency Not Discharged.**

Where guarantors of partnership loan were limited partners in company which had been holder of the property for which a deed of trust had been given to secure the loan, and by the terms of partnership agreement of the company that held the property had no right to receive specific property other than cash for their contribution, and the law in effect at time of action provided that "[a] limited partner's interest in the partnership is personal property," the guarantors had no real property interest which was subject to foreclosure,

and therefore the deficiency statute was inapplicable and bank's failure to seek a deficiency judgment against the principals within the statutorily prescribed 90 days did not discharge the guarantors from their obligation on the deficiency by operation of law. *First Interstate Bank v. Gill*, 108 Idaho 576, 701 P.2d 196 (1985).

#### **Property Owner's Opinion as to Value.**

In determining the fair market value of the property, the property owner has the right to render an opinion concerning the value of his property. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

#### **Purchase Offer by Third Party.**

In determining the fair market value of the property, the district judge did not err by admitting evidence of a third party's offer to purchase the property several months before the trustee's sale, where the evidence was reliable, nonspeculative and free from hearsay, confrontation or other problems. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

#### **Simultaneous Foreclosure.**

Where acceptable to the mortgagees, there is no impediment to ordering a simultaneous foreclosure; the foreclosure sale would result in each party being reimbursed by priority to the extent of the proceeds, neither would receive a redemption right, and each would receive a deficiency to the extent his or her debt was not satisfied, with appropriate credit being given for the reasonable value of the security. *First Sec. Bank v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986).

#### **Sufficient Proof of Value.**

Where there was evidence of an offer of \$325,000, one appraiser valued the property at \$265,000, and another appraiser valued the property at \$340,000, there was sufficient evidence to support the judge's finding that the property was worth at least the amount of the indebtedness at the time of the trustee's sale, approximately \$317,000. *Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986).

#### **Waiver of Defense.**

A guarantor may legally contract to waive a defense provided by anti-deficiency judgment statute. *Valley Bank v. Larson*, 104 Idaho 772, 663 P.2d 653 (1983).

Where guarantor of loan expressly waived any right to require creditor to proceed against the principal obligor, or to pursue any other available remedy, such language was broad enough to include waiver of a defense that creditor failed to seek recovery for the deficiency from debtor within the three-month time period prescribed by this section.

Valley Bank v. Larson, 104 Idaho 772, 663 P.2d 653 (1983).

**45-1513. Transfers and trusts are conveyances.** — A deed of trust or transfer of any interest in real property in trust to secure the performance of any obligation shall be a conveyance of real property. [1957, ch. 181, § 13, p. 345.]

**Delivery.**

A deed of trust is a conveyance of real property and, to be valid, requires delivery of

the instrument. Defendant A v. Idaho State Bar, 132 Idaho 662, 978 P.2d 222 (1999).

**45-1514. Reconveyance upon satisfaction of obligation.** — Upon performance of the obligation secured by the deed of trust, the trustee upon written request of the beneficiary shall reconvey the estate of real property described in the deed of trust to the grantor; providing that in the event of such performance and the refusal of any beneficiary to so request or the trustee to so reconvey, as above provided, such beneficiary or trustee shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property. [1957, ch. 181, § 14, p. 345.]

**Cited in:** Murr v. Selag Corp., 113 Idaho 773, 747 P.2d 1302 (Ct. App. 1987).

ANALYSIS

**Accrual of interest.**

Payment contemporaneous with conveyance. Trustee's fee.

**Accrual of Interest.**

When a tender properly conditioned on delivery of a reconveyance deed has been made, no further interest accrues on the debt, regardless of the length of time that the trustee may take to deliver the reconveyance. Brinton v. Haight, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

A tender of full payment of the debt, conditioned on delivery of a reconveyance deed, need not include a tender of the trustee's fee

in order to be effective to halt further accumulation of interest. Brinton v. Haight, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

**Payment Contemporaneous With Conveyance.**

A grantor of a deed of trust may condition a tender of full payment upon the contemporaneous delivery of a deed or reconveyance, and that such condition does not vitiate the tender's effectiveness to terminate the accrual of interest. Brinton v. Haight, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

**Trustee's Fee.**

A debtor's right to a deed of reconveyance is not contingent upon payment of a trustee's fee which is not part of the debt secured by the deed to trust. Brinton v. Haight, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994).

**45-1515. Time limits for foreclosure.** — The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property. [1957, ch. 181, § 15, p. 345.]

**Compiler's notes.** Section 16 of S.L. 1957, ch. 181, is compiled as § 45-901.

**Cross ref.** Mortgage foreclosure proceedings, § 6-101 et seq.



CHAPTER 16

SEED LIENS

SECTION.

45-1601 — 45-1607. [Repealed.]

45-1601 — 45-1607. Seed liens. [Repealed.]

**Compiler's notes.** Sections 45-1601 — 45-1607 which comprised S.L. 1959, ch. 152, §§ 1 — 7, p. 349, were repealed by § 1 of S.L. 1989, ch. 359. However, § 3 of S.L. 1989, ch. 359 provided that "this act shall not take effect unless and until a sufficient appropriation to

support its implementation is passed for the fiscal year 1990." An appropriation was made from the general appropriation to the Secretary of State in order to implement this act and therefore it has gone into effect. For present law see §§ 45-301 — 45-317.

CHAPTER 17

NONCONSENSUAL COMMON LAW LIENS

SECTION.

45-1701. Definitions.

45-1702. No duty to accept nonconsensual common law liens — notice of invalid lien.

45-1703. Petition to district court for release

SECTION.

of nonconsensual common law lien.

45-1704. Liens against public officers and employees.

45-1705. Penalties.

**45-1701. Definitions. —** As used in this chapter:

(1) "Federal official or employee" means an employee of the federal government and federal agency as defined for purposes of the federal tort claims act, 28 U.S.C. Sec. 2671;

(2) "Lien" means an encumbrance on property as security for the payment of a debt;

(3) "Nonconsensual common law lien" is a lien that:

- (a) Is not provided for by a specific state or federal statute;
- (b) Does not depend upon the consent of the owner of the property affected for its existence;
- (c) Is not a court-imposed equitable or constructive lien; and
- (d) Is not of a kind commonly utilized in legitimate commercial transactions.

(4) "State or local official or employee" means an appointed or elected official or any employee of a state agency, board, commission, department in any branch of state government, or institution of higher education or of a school district, political subdivision, or unit of local government of this state. [I.C., § 45-1701, as added by 1996, ch. 151, § 1, p. 489.]

**45-1702. No duty to accept nonconsensual common law liens — notice of invalid lien. —** (1) No person has a duty to accept for filing or recording any claim of nonconsensual common law lien unless the lien is authorized by contract, lease, statute or imposed by a court having jurisdiction over property affected by the lien, nor does any person have a duty to reject for filing or recording any claim of lien, except as provided in subsection (2) of this section.

(2) No person shall be obligated to accept for filing any claim of nonconsensual common law lien against a federal, state, or local official or employee based on the performance or nonperformance of that official's or employee's duties unless accompanied by a specific order from a court of competent jurisdiction authorizing the filing of such lien.

(3) If a claim of lien as described in subsection (2) of this section has been accepted for filing, the recording officer shall accept for filing a notice of invalid lien signed and submitted by the assistant United States attorney representing the federal agency of which the individual is an official or employee; the deputy attorney general representing the state agency, board, commission, department, or institution of higher education of which the individual is an official or employee; or the attorney representing the school district, political subdivision, or unit of local government of this state of which the individual is an official or employee. A copy of the notice of invalid lien shall be mailed by the attorney to the person who filed the claim of lien at his or her last known address. No recording officer or county shall be liable for the acceptance for filing of a claim of lien as described in subsection (2) of this section, nor for the acceptance for filing of a notice of invalid lien pursuant to this subsection. [I.C., § 45-1702, as added by 1996, ch. 151, § 1, p. 489.]

**45-1703. Petition to district court for release of nonconsensual common law lien.** — (1) Any person whose real or personal property is subject to a recorded claim of nonconsensual common law lien who believes the claim of lien is invalid, may petition the district court of the county in which the claim of lien has been recorded for an order, which may be granted *ex parte*, directing the lien claimant to appear before the court at a time no earlier than six (6) nor later than twenty-one (21) days following the date of service of the petition and order on the lien claimant, and show cause, if any, why the claim of lien should not be stricken and other relief provided for by this section should not be granted. The petition shall state the grounds upon which relief is requested, and shall be supported by the affidavit of the petitioner or his or her attorney setting forth a concise statement of the facts upon which the motion is based. The order shall be served upon the lien claimant by personal service, or, where the court determines that service by mail is likely to give actual notice, the court may order that service be made by any person over eighteen (18) years of age, who is competent to be a witness, other than a party, by mailing copies of the petition and order to the lien claimant at his or her last known address or any other address determined by the court to be appropriate. Two (2) copies shall be mailed, postage prepaid, one (1) by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender.

(2) The order shall clearly state that if the lien claimant fails to appear at the time and place noted, the claim of nonconsensual common law lien shall be stricken and released and that the lien claimant shall be ordered to pay the costs incurred by the petitioner, including reasonable attorney's fees.

(3) The clerk of the court shall assign a case number to the petition and obtain from the petitioner a filing fee of thirty-five dollars (\$35.00).



(4) If, following a hearing on the matter, the court determines that the claim of nonconsensual common law lien is invalid, the court shall issue an order striking and releasing the claim of lien and awarding costs and reasonable attorney's fees to the petitioner to be paid by the lien claimant. If the court determines that the claim of lien is valid, the court shall issue an order so stating and may award costs and reasonable attorney's fees to the lien claimant to be paid by the petitioner. [I.C., § 45-1703, as added by 1996, ch. 151, § 1, p. 489.]

**45-1704. Liens against public officers and employees.** — Any claim of lien against a federal, state, or local official or employee based on the performance or nonperformance of that official's or employee's duties shall be invalid unless accompanied by a specific order from a court of competent jurisdiction authorizing the filing of such lien or unless a specific statute authorizes the filing of such lien. [I.C., § 45-1704, as added by 1996, ch. 151, § 1, p. 489.]

**45-1705. Penalties.** — Any person who offers to have recorded or filed in the office of the county clerk and recorder any document purporting to create a nonconsensual common law lien against real property, knowing or having reason to know that such document is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid, shall be liable to the owner of such real property for the sum of not less than five thousand dollars (\$5,000) or for actual damages caused thereby, whichever is greater, together with reasonable attorney's fees. Any grantee or other person purportedly benefited by a recorded document which creates a nonconsensual common law lien against real property and is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid, who willfully refuses to release such document or record upon request of the owner of the real property affected shall be liable to such owner for the damages and attorney's fees provided in this section. [I.C., § 45-1705, as added by 1996, ch. 151, § 1, p. 489.]

**Compiler's notes.** Section 2 of S.L. 1996, ch. 151 declared an emergency. Approved March 11, 1996.

## CHAPTER 18

### AGRICULTURAL COMMODITY DEALER LIENS

#### SECTION.

- 45-1801. Definitions.
- 45-1802. Lien created — Who may have.
- 45-1803. When lien attaches.
- 45-1804. Duration of lien — Notice of lien.
- 45-1805. Priority of lien.
- 45-1806. Discharge of lien.
- 45-1807. Filing notice of discharge.

#### SECTION.

- 45-1808. Form of filing with secretary of state — Fees.
- 45-1809. Joinder of actions — Filing fees as costs — Attorney's fees.
- 45-1810. Transition from county filing to filing with the secretary of state.

**45-1801. Definitions.** — As used in this chapter:

(1) "Agricultural product" means wheat, corn, oats, barley, rye, lentils, soybeans, grain sorghum, dry beans and peas, beans, safflower, sunflower seeds, tame mustards, rapeseed, flaxseed, leguminous seed or other small seed, or any other agricultural commodity, including any of the foregoing, whether cleaned, processed, treated, reconditioned or whether mixed, rolled or combined in any fashion or by any means to create a product used as animal, poultry or fish feed.

(2) "Agricultural commodity dealer" means any person who contracts for or solicits any agricultural product from an agricultural producer or negotiates the consignment or purchase of any agricultural product, or receives for sale, resale or shipment for storage, processing, cleaning or reconditioning, any agricultural product, or who buys during any calendar year, at least ten thousand dollars (\$10,000) worth of agricultural products from the producer or producers of the commodity. Agricultural commodity dealer shall not mean a person who purchases agricultural products for his own use as seed or feed.

(3) "Agricultural commodity producer" means the owner, tenant or operator of land who receives all or part of the proceeds from the sale, under contract, bailment or otherwise, or delivery under contract or bailment, of agricultural products produced on that land.

(4) "Person" means an individual, trust, partnership, limited liability company, corporation, or unincorporated association or any other legal or commercial entity. [I.C., § 45-1801, as added by 1983, ch. 202, § 1, p. 549; am. 1989, ch. 265, § 1, p. 644; am. 2001, ch. 363, § 1, p. 1279; am. 2002, ch. 308, § 1, p. 878.]

**Compiler's notes.** Section 2 of S.L. 1989, ch. 265 is compiled as § 45-1804.

Section 2 of S.L. 2002, ch. 308, is compiled as § 45-1803.

**45-1802. Lien created — Who may have.** — An agricultural commodity producer or an agricultural commodity dealer who sells, or delivers under contract or bailment, an agricultural product has a lien on the agricultural product or the proceeds of the sale of the agricultural product as provided in section 45-1804, Idaho Code. The lien created in this chapter may attach regardless of whether the purchaser uses the agricultural product purchased to increase the value of his livestock or whether he uses the agricultural product purchased to maintain the value, health or status of his livestock without actually increasing the value of his agricultural product. [I.C., § 45-1802, as added by 1983, ch. 202, § 1, p. 549; am. 1989, ch. 299, § 1, p. 746; am. 2000, ch. 339, § 1, p. 1132; am. 2001, ch. 363, § 2, p. 1279.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 339, is compiled as § 45-1804.

Section 3 of S.L. 2001, ch. 363, is compiled as § 45-1804.

**Sec. to sec. ref.** This section is referred to in §§ 45-1804, 45-1805, 45-1806.

**45-1803. When lien attaches.** — The lien created by section 45-1802, Idaho Code, attaches to the agricultural product and to the proceeds of the subsequent sale of the agricultural product on the date the agricultural



product is physically delivered to the purchaser or on the date any final payment is due, and unpaid, to the agricultural commodity producer or agricultural commodity dealer under any contract or bailment, whichever occurs last. [I.C., § 45-1803, as added by 1983, ch. 202, § 1, p. 549; am. 2002, ch. 308, § 2, p. 878.]

**Compiler's notes.** Section 1 of S.L. 2002, ch. 308 is compiled as § 45-1801.

**45-1804. Duration of lien — Notice of lien.** — (1) The lien provided for by section 45-1802, Idaho Code, remains in effect for a period of one hundred eighty (180) days after the date of attachment, except as provided in subsection (2) of this section.

(2) The lien provided for by section 45-1802, Idaho Code, is continued for a period of one (1) year from the date of filing if a written notice of lien, on a form prescribed by the secretary of state, is filed with the secretary of state by the agricultural commodity producer or the agricultural commodity dealer within one hundred eighty (180) days after the date of attachment. The form for the notice of lien shall require the following information:

- (a) A statement of the amount claimed by the agricultural commodity producer or agricultural commodity dealer after deducting all credits and offsets;
  - (b) The name, address and signature of the agricultural commodity producer or agricultural commodity dealer claiming the lien;
  - (c) The name and address of the person who purchased the agricultural product from the agricultural commodity producer or agricultural commodity dealer;
  - (d) A description of the agricultural product charged with the lien including crop year; and
  - (e) Such other information as the form prescribed by the secretary of state may require.
- (3) The notice of lien shall be entered in a searchable database maintained by the secretary of state. [I.C., § 45-1804, as added by 1983, ch. 202, § 1, p. 549; am. 1989, ch. 4, § 1, p. 5; am. 1989, ch. 265, § 2, p. 644; am. 2000, ch. 339, § 2, p. 1132; am. 2001, ch. 363, § 3, p. 1279; am. 2002, ch. 308, § 3, p. 878.]

**Compiler's notes.** This section was amended by two 1989 acts, ch. 4, § 1, and ch. 265, § 2, which appear to be compatible and are, in fact, identical.

Section 2 of S.L. 1989, ch. 4 is compiled as § 45-1809.

Sections 1 and 3 of S.L. 1989, ch. 265 are compiled as §§ 45-1801 and 45-1809, respectively.

Sections 1 and 3 of S.L. 2000, ch. 339, are compiled as §§ 45-1802 and 45-1807, respectively.

Section 2 of S.L. 2001, ch. 363, is compiled as § 45-1802.

**Sec. to sec. ref.** This section is referred to in §§ 45-1802, 45-1807 and 45-1808.

**45-1805. Priority of lien.** — The lien created by section 45-1802, Idaho Code, is preferred to a lien or security interest in favor of a creditor of the purchaser, regardless of whether the creditor's lien or security interest attaches to the agricultural product or proceeds of the sale of the agricul-

tural product before or after the date on which the lien created by section 45-1802, Idaho Code, attaches. [I.C., § 45-1805, as added by 1983, ch. 202, § 1, p. 549.]

**45-1806. Discharge of lien.** — The lien created by section 45-1802, Idaho Code, is discharged when the lienholder receives full payment for the agricultural product. If payment is received in the form of a negotiable instrument, full payment is received when the negotiable instrument clears banking channels. [I.C., § 45-1806, as added by 1983, ch. 202, § 1, p. 549.]

**45-1807. Filing notice of discharge.** — (1) If a notice of lien is filed pursuant to section 45-1804, Idaho Code, and the lienholder subsequently receives full payment, the lienholder shall file with the secretary of state a notice of discharge, signed by the lienholder, declaring that full payment has been received and that the lien is discharged.

(2) Upon receiving the notice, the secretary of state shall enter it in a searchable database kept to record such liens.

(3) If a lienholder, after receiving full payment, fails to file a notice of discharge of the lien within thirty (30) days after being requested in writing to do so, he is liable to the purchaser of the agricultural product for damages in the amount of three hundred dollars (\$300). [I.C., § 45-1807, as added by 1983, ch. 202, § 1, p. 549; am. 2000, ch. 339, § 3, p. 1132.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 339, is compiled as § 45-1804.

**45-1808. Form of filing with secretary of state — Fees.** — The secretary of state shall prescribe the form of the filing provided for by sections 45-1804 and 45-1807, Idaho Code. The fee for the filing provided for by section 45-1804, Idaho Code shall be five dollars (\$5.00). The fee for searching the database maintained by the secretary of state pursuant to this chapter shall be five dollars (\$5.00). There shall be no fee for filing a notice of discharge pursuant to section 45-1807, Idaho Code. [I.C., § 45-1808, as added by 1983, ch. 202, § 1, p. 549; am. 1984, ch. 43, § 1, p. 71; am. 2000, ch. 339, § 4, p. 1132.]

**Compiler's notes.** Section 5 of S.L. 2000, ch. 339, is compiled as § 45-1810.

**45-1809. Joinder of actions — Filing fees as costs — Attorney's fees.** — Any number of persons claiming liens against the same property under this chapter may join in the same action, and when separate actions are commenced, the court may consolidate them. The court shall also, as part of the cost, allow the moneys paid for filing and recording the claim, and a reasonable attorney's fee for each person claiming a lien. [I.C., § 45-1809, as added by 1989, ch. 4, § 2, p. 5 and by 1989, ch. 265, § 3, p. 644.]

**Compiler's notes.** This section was enacted by two identical 1989 acts, ch. 4, § 2, effective February 21, 1989 and ch. 256, § 3, effective April 3, 1989.



Section 1 of S.L. 1989, ch. 4 is compiled as § 45-1804.  
 Section 2 of S.L. 1989, ch. 265 is compiled as § 45-1804.

Section 3 of S.L. 1989, ch. 4 declared an emergency. Approved February 21, 1989.  
 Section 4 of S.L. 1989, ch. 265 declared an emergency. Approved April 3, 1989.

**45-1810. Transition from county filing to filing with the secretary of state.** — All liens created by this chapter on and after July 1, 2000, shall be filed with the secretary of state. All rights and duties obtained by secured parties pursuant to this chapter before July 1, 2000, shall remain in effect; provided, that liens created by this chapter before July 1, 2000, that are properly filed in the office of the county recorder before that date shall remain in effect and may be extended or renewed in the county beyond July 1, 2000. [I.C., § 45-1810, as added by 2000, ch. 339, § 5, p. 1132.]

**Compiler's notes.** Section 4 of S.L. 2000, ch. 339, is compiled as § 45-1808.

## CHAPTER 19

### STATE LIENS

#### SECTION.

- 45-1901. Purpose and scope.
- 45-1902. Definitions.
- 45-1903. Creation of lien — Attachment.
- 45-1904. Notice of lien — Content — Delivery.
- 45-1905. Effect of notice — Priority.
- 45-1906. Duration of notice — Lapse — Continuation.

#### SECTION.

- 45-1907. Amendment of notice of lien.
- 45-1908. Duty of filing agency to release upon satisfaction.
- 45-1909. Duties of secretary of state.
- 45-1910. Effective date and transition.

**45-1901. Purpose and scope.** — (1) The purpose of this chapter is to provide a system for filing notices of liens in favor of or enforced by the state of Idaho with the office of the secretary of state.

(2) The scope of this chapter is limited to liens in the real and personal property of:

- (a) Taxpayers or other persons against whom the state tax commission has liens pursuant to title 63, Idaho Code, for unpaid personal or corporation income tax, sales tax, employee withholding taxes, fuel tax, or any other amounts due under statutes administered by the commission, plus interest, penalties and additional amounts;
- (b) Persons against whom the department of labor has liens pursuant to chapter 13, title 72, Idaho Code, for unpaid employment security contributions, plus interest and penalties;
- (c) Persons liable for overpayment of benefits against whom the department of labor has liens pursuant to chapter 13, title 72, Idaho Code, for overpayment of benefits, plus interest;
- (d) Persons against whom the department of labor has liens for wage claims pursuant to chapter 6, title 45, Idaho Code;
- (e) Individuals who are subject to liens for child support delinquency pursuant to chapter 12, title 7, Idaho Code; and
- (f) Individuals who are subject to liens pursuant to chapter 2, title 56, Idaho Code, for medical assistance, or the estates of such individuals.

[I.C., § 45-1901, as added by 1997, ch. 205, § 1, p. 607; am. 1999, ch. 51, § 25, p. 115.]

**Compiler's notes.** Section 10 of S.L. 205 read: "Notwithstanding the effective dates specified in section [Sections] 1 through 9 of this act, nothing in this act shall take effect unless the secretary of state shall certify to the Idaho Code Commission that he has received a sufficient appropriation to provide for the development of the technology required to implement the provisions of this act. If the certification is not made by the twenty-first day after the adjournment sine die of the

First Regular Session of the Fifty-fourth Idaho Legislature, this act shall be null and void."

The Secretary of State has so certified to the Idaho Code Commission and thus the Chapter 205 became effective as prescribed therein.

Section 24 of S.L. 1999, ch. 51, is compiled as § 45-621.

**Sec. to sec. ref.** This chapter is referred to in §§ 63-3051, 72-1360 and 72-1369.

**45-1902. Definitions.** — (1) "Debtor" means a taxpayer or other person against whom there is a final unpaid tax assessment collectible by the state tax commission, a person against whom the department of labor has a lien for a wage claim, unpaid contributions or overpayment of benefits, an individual who is subject to a lien for child support delinquency, or an individual who is subject to a lien for medical assistance.

(2) "Delivered" means transmission to and receipt by the secretary of state of a notice of lien or other notice in any medium to which the filing agency and the secretary of state have agreed.

(3) "Filing agency" means the state tax commission, the department of labor or the department of health and welfare.

(4) "Person" means an individual, organization or legal entity. [I.C., § 45-1902, as added by 1997, ch. 205, § 1, p. 607; am. 1999, ch. 51, § 26, p. 115.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.

**45-1903. Creation of lien — Attachment.** — Creation and attachment of liens for which notices are filed pursuant to this chapter are governed by the provisions of chapter 6 of title 45, title 63, chapter 13 of title 72, chapter 12 of title 7, and chapter 2 of title 56, Idaho Code. [I.C., § 45-1903, as added by 1997, ch. 205, § 1, p. 607; am. 1999, ch. 51, § 27, p. 115.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.

**45-1904. Notice of lien — Content — Delivery.** — (1) The notice of lien shall include:

- (a) The name and last known address of the debtor;
- (b) The name and address of the filing agency;
- (c) The basis for the lien, including, but not limited to, income tax, sales tax, employment security contributions, payments in lieu of contributions, overpayment of benefits, wage claims, a child support delinquency or medical assistance;



(d) Such other information as may be required by the relevant provisions under which the lien was created and attached, or as may be agreed by the filing agency and the secretary of state.

(2) The notice of lien will be delivered to and receipt will be acknowledged by the secretary of state in a medium and format to which the filing agency and the secretary of state have agreed.

(3) Each notice of lien shall be authenticated by the filing agency in a manner to which the filing agency and the secretary of state have agreed.

(4) A notice of lien is filed when it complies with subsection (1) of this section and has been delivered to and receipt acknowledged by the secretary of state. [I.C., § 45-1904, as added by 1997, ch. 205, § 1, p. 607; am. 1999, ch. 51, § 28, p. 115.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910. **Sec. to sec. ref.** This section is referred to in §§ 45-1907, 45-1910, 56-218 and 56-218A.

**45-1905. Effect of notice — Priority.** — (1) When a notice of lien is filed, the state lien is perfected in all of the existing and after-acquired property of the debtor, both real and personal, tangible and intangible, to which the lien attaches pursuant to the relevant provisions of chapter 6 of title 45, title 63, chapter 13 of title 72, chapter 12 of title 7, or chapter 2 of title 56, Idaho Code.

(2) As to personal property, the perfected lien shall have the same priority as a security interest which becomes perfected under chapter 9, title 28, Idaho Code, at the same time the notice of lien is filed.

(3) As to real property, the perfected lien shall have the same priority as a mortgage which is recorded at the same time the notice of lien is filed.

(4) Nothing herein limits the authority of the state tax commission to subordinate its lien to another lien in the manner provided by section 63-3055, Idaho Code. [I.C., § 45-1905, as added by 1997, ch. 205, § 1, p. 607; am. 1999, ch. 51, § 29, p. 115.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910. **Sec. to sec. ref.** This section is referred to in § 45-1910.

**45-1906. Duration of notice — Lapse — Continuation.** — (1) Except as provided in subsection (2) of this section, a notice of lien is effective for a period of five (5) years from the date of filing, unless sooner released by the filing agency. Effectiveness of the notice of lien lapses on the expiration of the five (5) year period unless a notice of continuation is filed prior to the lapse.

(2) A notice of lien for child support delinquency is effective until a notice of release of lien is filed by the department of health and welfare.

(3) Upon release or lapse of the notice's effectiveness, the state lien becomes unperfected. In that case, the lien is deemed to have been unperfected as against a person who became a purchaser or lien creditor before the release or lapse.

(4) Except as to notices of lien filed pursuant to subsection (2) of this section, a notice of continuation of effectiveness of the notice of lien may be

filed by the filing agency within six (6) months prior to the expiration of the five (5) year period specified in subsection (1) of this section. The notice of continuation will be delivered to and receipt acknowledged by the secretary of state in a medium and format to which the filing agency and the secretary of state have agreed, and shall be authenticated by the filing agency in a manner to which the filing agency and the secretary of state have agreed. Upon filing of the notice of continuation, the effectiveness of the original notice of lien is continued for five (5) years after the last date to which the notice of lien was effective, whereupon it lapses unless another notice of continuation is filed prior to such lapse. [I.C., § 45-1906, as added by 1997, ch. 205, § 1, p. 607.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.      **Sec. to sec. ref.** This section is referred to in § 45-1910

**45-1907. Amendment of notice of lien.** — (1) The filing agency may amend a notice of lien in any respect by filing a notice of amendment with the secretary of state.

(2) The notice of amendment shall identify the notice of lien to which it relates, and it shall include such information and be in such medium and format as agreed by the filing agency and the secretary of state.

(3) The requirements for delivery, acknowledgment of receipt and authentication of a notice of amendment shall be the same as those prescribed for a notice of lien in section 45-1904, Idaho Code.

(4) The filing of a notice of amendment does not extend the period of effectiveness of the notice of lien to which it relates. [I.C., § 45-1907, as added by 1997, ch. 205, § 1, p. 607.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.

**45-1908. Duty of filing agency to release upon satisfaction.** —

(1) Except as to a state lien for child support delinquency, when a state lien has been satisfied, the filing agency shall, within thirty (30) days after satisfaction, file with the secretary of state a notice of release of lien.

(2) As to a state lien for child support delinquency, the department of health and welfare shall file a notice of release of lien within thirty (30) days after:

- (a) The delinquency has been satisfied; or
- (b) The underlying lien is no longer valid.

(3) The notice of release will be delivered to and receipt acknowledged by the secretary of state in a medium and format to which the filing agency and the secretary of state have agreed, and shall be authenticated by the filing agency in a manner to which the filing agency and the secretary of state have agreed. [I.C., § 45-1908, as added by 1997, ch. 205, § 1, p. 607.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.      **Sec. to sec. ref.** This section is referred to in §§ 7-1206, 45-1910.



**45-1909. Duties of secretary of state.** — (1) The secretary of state shall maintain notices of state lien in his information management system in a form that permits them to be reduced to written form.

(2) The secretary of state will provide information concerning state liens on the same conditions and in the same form as he provides information on financing statements pursuant to section 28-9-523, Idaho Code.

(3) The secretary of state will compile and publish a list of all effective notices of state lien which the filing agencies have identified as pertaining to debtors who are agricultural producers. The list will be published on the same schedule and conditions as the list of liens in farm crops which is published pursuant to section 45-312, Idaho Code. The list of notices of state lien may be appended to the list of liens in farm crops, and no fee shall be charged in addition to the fee for the list of liens in farm crops. Failure of a filing agency to identify a debtor as an agricultural producer shall not adversely affect perfection of a state lien for any purpose. [I.C., § 45-1909, as added by 1997, ch. 205, § 1, p. 607; am. 2001, ch. 208, § 28, p. 703.]

**Compiler's notes.** For the effective date of this section see Compiler's notes, § 45-1910.

Sections 27 and 29 of S.L. 2001, ch. 208, are compiled as §§ 31-2402 and 49-120, respectively.

Section 31 of S.L. 2001, ch. 208 provided that the act should take effect on and after July 1, 2001.

**45-1910. Effective date and transition.** — (1) This chapter shall be in full force and effect for all notices of state lien which are filed on or after July 1, 1998.

(2) Except for notices of state lien for child support delinquency, the transition period for filing notices of state lien shall begin on January 1, 1998, and end on June 30, 1998. The following conditions shall apply to notices which were filed or recorded before January 1, 1998, and to notices filed during the transition period:

(a) A notice of state lien which was recorded with a county recorder between January 1, 1993, and June 30, 1993, shall lapse on the fifth anniversary of the recording date, unless the filing agency records a notice of renewal with the recorder prior to the lapse and files a notice of transition and continuation with the secretary of state before July 1, 1998. A notice of transition and continuation shall include all of the information required by section 45-1904, Idaho Code, the date of the recording of the original notice with the county recorder, and a statement that the effectiveness of the notice is to be continued for another five (5) year period. In the event the filing agency files a notice of transition and continuation, the effectiveness of the notice of state lien shall lapse on the tenth anniversary of the original recording date, unless the filing agency files a further notice of continuation as required by section 45-1906(4), Idaho Code.

(b) A notice of state lien which was recorded with a county recorder between July 1, 1993, and December 31, 1997, will remain effective beyond June 30, 1998, only if a filing agency files a notice of transition with the secretary of state during the transition period. A notice of transition shall include all of the information required by section 45-1904,

Idaho Code, and the date of the recording of the original notice with the county recorder. After a notice of transition has been filed, the effectiveness of the notice of state lien shall lapse on the fifth anniversary of the date of the recording with the county recorder, unless the filing agency files a notice of continuation as required by section 45-1906(4), Idaho Code.

(c) A notice of state lien which is first filed during the transition period shall be fully effective during the transition period only if the filing agency has filed a notice with the secretary of state and recorded a notice with the appropriate county recorder. A notice of state lien which is filed with the secretary of state during the transition period, and which is not recorded with the county recorder, shall be fully effective on and after July 1, 1998, and shall be effective before that date against any party with actual notice after the date of filing. A notice of state lien which is recorded with a county recorder during the transition period, but not filed with the secretary of state, shall be fully effective through June 30, 1998. A notice of state lien first filed during the transition period shall lapse on the fifth anniversary of the date of filing with the secretary of state, unless the filing agency files a notice of continuation as required by section 45-1906(4), Idaho Code.

(3) The effectiveness of a notice of state lien for child support delinquency which was recorded with a county recorder shall lapse on July 1, 1998, unless a notice of transition is filed with the secretary of state on or before July 1, 1998. If a notice of transition is filed, the notice of state lien will remain effective until a notice of release is filed pursuant to section 45-1908(2), Idaho Code.

(4) Notwithstanding the provisions of section 45-1905, Idaho Code, a state lien which was perfected under a prior law and transitioned to perfection under this chapter without a break in perfection, shall have priority as if it had been filed under this chapter on the date of its original perfection under the prior law. [I.C., § 45-1910, as added by 1997, ch. 205, § 1, p. 607.]

**Compiler's notes.** Section 2 of S.L. 1997, ch. 205 is compiled as § 56-218.

Section 10 of S.L. 1997, ch. 205 read: "Notwithstanding the effective dates specified in Section [Sections] 1 through 9 of this act, nothing in this act shall take effect unless the secretary of state shall certify to the Idaho Code Commission that he has received a sufficient appropriation to provide for the development of the technology required to

implement the provisions of this act. If the certification is not made by the twenty-first day after the adjournment sine die of the First Regular Session of the Fifty-fourth Idaho Legislature, this act shall be null and void."

The Secretary of State has so certified to the Idaho Code Commission and thus the Chapter 205 became effective as prescribed therein.



## TITLE 46

### MILITIA AND MILITARY AFFAIRS

#### CHAPTER

1. STATE MILITIA — ORGANIZATION AND STAFF, §§ 46-101 — 46-115.
2. OFFICERS AND ENLISTED MEN, §§ 46-201 — 46-226.
3. EQUIPMENT AND ALLOWANCES, §§ 46-301 — 46-314.
4. IMMUNITIES AND PRIVILEGES, §§ 46-401 — 46-409.
5. SELECTIVE SERVICE REGISTRATION AWARENESS AND COMPLIANCE, §§ 46-501 — 46-505.
6. MARTIAL LAW AND ACTIVE DUTY, §§ 46-601 — 46-610.

#### CHAPTER

7. ARMORIES AND MILITARY PROPERTY, §§ 46-701 — 46-727.
8. MISCELLANEOUS AND GENERAL PROVISIONS, §§ 46-801 — 46-806.
9. [REPEALED.]
10. STATE DISASTER PREPAREDNESS ACT, §§ 46-1001 — 46-1025.
11. CODE OF MILITARY JUSTICE, §§ 46-1101 — 46-1194.

### CHAPTER 1

#### STATE MILITIA — ORGANIZATION AND STAFF

#### SECTION.

- 46-101. National defense act — Definitions.
- 46-102. State militia — Membership — Exemptions.
- 46-103. State militia — Division into classes.
- 46-104. Enrollment of persons liable to service — Duty of county assessor — Penalty.
- 46-105. Appointment and enlistment of female citizens.
- 46-106. Organized militia — Organization when called into active service.
- 46-107. Conformity of the national guard to federal law.

#### SECTION.

- 46-108. Property and fiscal officer.
- 46-109. General orders — Force and effect as statutes.
- 46-110. Governor as commander-in-chief — Foreign troops — Restrictions on entry into state.
- 46-111. Adjutant general.
- 46-112. Duties of the adjutant general.
- 46-113. Assistant adjutants general.
- 46-114. Staff officers — Aides-de-camp.
- 46-115. [Repealed.]

**46-101. National defense act — Definitions.** — The state of Idaho does hereby accept the benefits and provisions of the national defense act, and it is the intent of this code to conform to all laws and regulations of the United States affecting the national guard.

**DEFINITIONS.** — As used in this code:

(a) "National guard" means the Idaho army national guard and the Idaho air national guard.

(b) "National defense act" means the federal law for making further and more effective provisions for the national defense and for other purposes approved June 3, 1916, (Title 32, United States Code), and any and all other acts that have been or may hereafter be enacted amendatory thereof and supplementary thereto.

(c) "Uniform code of military justice" means the law for the disciplining of the armed forces of the United States (Chapter 47, Title 10, United States Code).

(d) "Officer" means commissioned officers and warrant officers. [1927, ch. 261, § 1, p. 510; I.C.A., § 45-101; am. 1957, ch. 174, § 1, p. 312.]

**Compiler's notes.** The National Defense Act referred to in this section is compiled as 32 U.S.C. §§ 101-716, and the Uniform Code of Military Justice is compiled as 10 U.S.C. §§ 801-940.

The words enclosed in parentheses so appeared in the 1957 Session Laws.

Section 2 of S.L. 1957, ch. 174 is compiled as § 46-103.

**Cross ref.** Buildings used by military organizations exempt from execution, § 11-605.

Constitutional provisions on militia, Const., Art. 14.

Soldiers and sailors, tit. 65.

**Sec. to sec. ref.** This title is referred to in § 67-802.

**Collateral References.** 53 Am. Jur. 2d, Military, and Civil Defense, §§ 25-40.

Constitutionality of statute providing for payment to public officers, who enter military service of United States. 145 A.L.R. 1156.

**46-102. State militia — Membership — Exemptions.** — The militia of the state of Idaho shall consist of all able-bodied male citizens of the state, and all other able-bodied males who have or shall have declared their intentions to become citizens of the United States and are residents of the state of Idaho; who shall be more than eighteen (18) years of age, and except as hereinafter provided, not more than forty-five (45) years of age, subject to the following exemptions:

1. Persons exempted from service in the militia by the constitution of the state of Idaho and by the laws of the United States from enlistment or draft into the regular army. Provided, however, that voluntary enlistments, with the written consent of the parent or guardian of any able-bodied male citizens over the age of sixteen (16) years may be accepted and such enlistees inducted into the organized militia of the state of Idaho in time of war, and as classified in section 46-103, except that the provision for the enlistment of able-bodied male citizens under the age of eighteen (18) years will terminate six (6) months following the declaration of peace. [1927, ch. 261, § 2, p. 510; I.C.A., § 45-102; am. 1943, ch. 46, § 1, p. 92.]

**Compiler's notes.** Section 2 of S.L. 1943, ch. 46 declared an emergency. Approved Feb. 15, 1943.

**Cross ref.** Eligibility to enrollment in militia, Const., Art. 14, § 1.

**Sec. to sec. ref.** This section is referred to in § 46-1002.

**Collateral References.** Incompatibility of offices or positions in military service and civil service. 26 A.L.R. 142; 132 A.L.R. 254; 147 A.L.R. 1419; 148 A.L.R. 1399; 150 A.L.R. 1444.

**46-103. State militia — Division into classes.** — The militia of the state of Idaho shall be divided into three (3) classes, to wit:

The national guard, the organized militia, and the unorganized militia. The national guard shall consist of enlisted personnel between the ages of seventeen (17) and sixty-four (64), organized and equipped and armed as provided in the national defense act, and of commissioned officers between the ages of eighteen (18) and sixty-four (64) years, who shall be appointed and commissioned by the governor as commander-in-chief, in conformity with the provisions of the national defense act, the rules and regulations promulgated thereunder, and as authorized by the provisions of this act. The organized militia shall include any portion of the unorganized militia called into service by the governor, and not federally recognized. The unorganized militia shall include all of the militia of the state of Idaho not included in the national guard or the organized militia. [1927, ch. 261, § 3, p. 510; I. C.A., § 45-103; am. 1957, ch. 174, § 2, p. 312.]



**Compiler's notes.** The words "this act" refer to S.L. 1927, ch. 261 compiled as chs. 1-4 and 6-8 of this title.

Section 4 of S.L. 1927, ch. 261 is compiled as § 46-601.

Section 1 of S.L. 1957, ch. 174 is compiled as § 46-101.

**Cross ref.** Active service, when governor may call national guard, § 46-601.

Martial law, when governor may declare, § 46-602.

National defense act, see Compiler's note, § 46-101.

National guard or organized militia on active duty, articles of war in force, § 46-603.

**Sec. to sec. ref.** This section is referred to in § 46-1102.

**Collateral References.** Minors, enlistment or mustering of. 137 A.L.R. 1467; 147 A.L.R. 1311; 151 A.L.R. 1455; 153 A.L.R. 1420; 155 A.L.R. 1451; 157 A.L.R. 1449.

**46-104. Enrollment of persons liable to service — Duty of county assessor — Penalty.** — Whenever the governor deems it necessary he may order a registration under such regulations as he may prescribe, to be made by the assessors of the various counties of this state, of all persons resident in their respective counties and liable to serve in the militia. Such registration shall be on blanks furnished by the adjutant general, and shall state the name, residence, age and occupation of the person registered and their military service.

If any assessor wilfully refuses or neglects to perform any duty which may be required of him by the governor under the authority of this act, he shall be deemed guilty of a misdemeanor and, on conviction thereof, he shall be fined in a sum of not less than \$300 nor more than \$800. [1927, ch. 261, § 7, p. 510; I.C.A., § 45-104; am. 1957, ch. 174, § 3, p. 312.]

**Compiler's notes.** For words "this act" see Compiler's notes, § 46-103.

Section 6 of S.L. 1927, ch. 261 is compiled as § 46-603.

**Cross ref.** Eligibility to enrollment in militia, Const., Art. 14, § 1.

Legislature authorized to provide for enrollment, Const., Art. 14, § 2.

**46-105. Appointment and enlistment of female citizens.** — The governor may authorize the appointment and enlistment of female citizens of the state in the national guard and organized militia, and while so serving they shall have the same status as male members of the military forces. [1927, ch. 261, § 8, p. 510; I.C.A., § 45-105; am. 1957, ch. 174, § 4, p. 312; am. 1994, ch. 343, § 1, p. 1079.]

**46-106. Organized militia — Organization when called into active service.** — Whenever the governor as commander-in-chief, shall call into the active service of the state the unorganized militia or any part thereof, it shall be organized into such units and shall be armed and equipped in such manner as the governor in his discretion shall deem proper. The officers thereof, shall be appointed and commissioned by the governor under such rules and regulations as he may deem expedient to promulgate. [1927, ch. 261, § 9, p. 510; I.C.A., § 45-106; am. 1957, ch. 174, § 5, p. 312.]

**46-107. Conformity of the national guard to federal law.** — The governor is authorized and it shall be his duty from time to time to make and publish such orders as may be necessary to conform the national guard in organization, armament and discipline, and otherwise, to that prescribed

and authorized by the national defense act and other laws of the United States and the regulations issued thereunder for the national guard. [1927, ch. 261, § 10, p. 510; I.C.A., § 45-107; am. 1939, ch. 50, § 1, p. 91; am. 1957, ch. 174, § 6, p. 312.]

**Compiler's notes.** Section 2 of S.L. 1939, ch. 50 is compiled as § 46-113.

**46-108. Property and fiscal officer.** — The governor shall appoint with the advice and approval of the adjutant general, a property and fiscal officer who shall be selected from the national guard of Idaho and shall have had commissioned service therein for over three (3) years. [1927, ch. 261, § 11, p. 510; I.C.A., § 45-108; am. 1957, ch. 174, § 7, p. 312.]

**Compiler's notes.** Section 12 of S.L. 1927, ch. 261 is compiled as § 46-801.

**46-109. General orders — Force and effect as statutes.** — The composition of all units of the national guard including the commissioned personnel thereof, other than that specifically provided for in this act, shall be fixed from time to time by the governor as commander-in-chief, and shall be announced in general orders, and shall be in accordance with federal laws and regulations pertaining to the national guard. Every order shall have the same force and effect as if specifically enacted and provided for by the statute. [1927, ch. 261, § 13, p. 510; I.C.A., § 45-109; am. 1957, ch. 174, § 8, p. 312.]

**Compiler's notes.** For words "this act" see Section 12 of S.L. 1927, ch. 261 is compiled as § 46-801.  
Compiler's notes, § 46-103.

**46-110. Governor as commander-in-chief — Foreign troops — Restrictions on entry into state.** — The governor of the state by virtue of his office, shall be commander-in-chief of the national guard, except of such thereof, as may be at times in the service of the United States. No armed military force from another state, territory or district shall be permitted to enter the state of Idaho for the purpose of doing military duty therein, without the permission of the governor, unless such force has been called into active service of the United States, and is acting under authority of the president of the United States. [1927, ch. 261, § 14, p. 510; I.C.A., § 45-110; am. 1957, ch. 174, § 9, p. 312.]

**Cross ref.** Importation of armed forces, constitutional prohibition, Const., Art. 14, § 6.  
**Collateral References.** 6 C.J.S., Armed Services, §§ 290, 292.

**46-111. Adjutant general.** — There shall be an adjutant general who shall be appointed by the governor and shall hold office during the pleasure of the governor and his commission shall expire with the term of the governor appointing him. The adjutant general shall be the commanding general of the military forces of the state and in addition to the duties delegated to him by law, he shall perform such other duties as prescribed by



the governor as commander-in-chief. The adjutant general shall be commissioned in the national guard with the rank of not less than brigadier general. No person is eligible for appointment as adjutant general unless he is a federally recognized member of the national guard with current service of not less than six (6) years as a commissioned officer in the national guard of Idaho and has attained the rank of colonel or above. [1927, ch. 261, § 15, p. 510; am. 1931, ch. 186, § 1, p. 310; I.C.A., § 45-111; am. 1957, ch. 174, § 10, p. 312; am. 1987, ch. 330, § 1, p. 689; am. 2001, ch. 141, § 1, p. 507.]

**Cross ref.** Adjutant general is custodian of military records and relics, Const., art. 14, § 4.

Assessment against officer in charge for lost or damaged equipment, § 46-305.

Payments of per diem and allowances made, § 46-605.

Representative of governor in coordination of disaster relief and civil defense, § 46-1006.

**Collateral References.** 6 C.J.S., Armed Services, § 291.

**46-112. Duties of the adjutant general.** — The duties of the adjutant general are:

(1) To be chief of staff to the commander-in-chief and administrative head of the military division of the office of governor.

(2) To be custodian of all military records and property of the national guard and organized militia.

(3) To publish and distribute all orders from the governor as commander-in-chief and perform such other duties as the governor may direct.

(4) Subject to the provisions of section 67-5303(j), Idaho Code, to employ such clerical and other personnel as may be required in the military division of the office of the governor.

(5) To pay the members of the national guard when such members are to be paid from state funds.

(6) To attend to the care, maintenance, repair and safekeeping of all federal equipment issued to the state of Idaho for the use of the national guard.

(7) To be custodian of the seal of the office of adjutant general and to deliver the same to his successor.

(8) To organize such units and recruit such personnel, with the consent of the governor, as may be authorized by federal law and regulations, and as may be required for the security of the state of Idaho.

(9) To supervise the training of the national guard and the organized militia.

(10) To make such returns and reports as may be required by the federal laws and regulations.

(11) To coordinate the planning and execution of state activities pertaining to the inauguration of the governor of the state of Idaho and the other elected state executive officers. [1927, ch. 261, § 16, p. 510; I.C.A., § 45-112; am. 1957, ch. 174, § 11, p. 312; am. 1974, ch. 22, § 11, p. 592; am. 2001, ch. 248, § 1, p. 900.]

**Compiler's notes.** Section 17 of S.L. 1927, ch. 261 is compiled as § 46-201.

Section 12 of S.L. 1974, ch. 22, formerly

compiled as § 46-1001, was repealed by S.L. 1975, ch. 212, § 1.

Section 61 of S.L. 1974, ch. 22 provided that

the act should take effect on and after July 1, 1974.

**46-113. Assistant adjutants general.** — There shall be two (2) assistant adjutants general who shall be appointed by and serve at the pleasure of the adjutant general.

(a) One (1) of the assistant adjutants general shall be appointed from the Idaho army national guard and may be chief of staff to the adjutant general for all the Idaho army national guard forces. He shall perform such duties as are assigned to him by the adjutant general. No person shall be eligible for appointment as assistant adjutant general under this subsection unless he is a member of the Idaho army national guard with at least six (6) years service as commissioned officer therein and has attained the rank of major or above. He shall be a federally recognized officer and may hold the rank of brigadier general or such other rank as may hereafter be authorized by the table of organization for the army national guard.

(b) The other assistant adjutant general shall be appointed from the Idaho air national guard and may be chief of staff to the adjutant general for all the Idaho air national guard forces. He shall perform such duties as are assigned to him by the adjutant general. No person shall be eligible for appointment as assistant adjutant general under this subsection unless he is a member of the Idaho air national guard with at least six (6) years service as a commissioned officer therein and has attained the rank of major or above. He shall be a federally recognized officer and may hold the rank of brigadier general or such other rank as may hereafter be authorized by the tables of organization for the air national guard.

(c) In the event of the absence or inability of the adjutant general to perform his duties, he shall designate one (1) of the assistant adjutants general to perform the duties of his office as acting adjutant general. If neither assistant adjutant general is available, he may designate any national guard officer to be the acting adjutant general. [1927, ch. 261, § 18, p. 510; am. 1931, ch. 186, § 2, p. 310; I.C.A., § 45-113; am. 1939, ch. 50, § 2, p. 91; am. 1957, ch. 174, § 12, p. 312; am. 1978, ch. 54, § 1, p. 101; am. 1989, ch. 354, § 1, p. 896; am. 1998, ch. 116, § 1, p. 432.]

**Compiler's notes.** Section 17 of S.L. 1927, ch. 261 is compiled as § 46-201.

Sections 1 and 3 of S.L. 1939, ch. 50 are compiled as §§ 46-107 and 46-205, respectively.

Section 2 of S.L. 1978, ch. 54 is compiled as § 46-206.

Section 2 of S.L. 1989, ch. 354, declared an emergency. Approved April 5, 1989.

**46-114. Staff officers — Aides-de-camp.** — The staff of the governor shall consist of the adjutant general and the assistant adjutant general. The staff may also include not to exceed 5 aides-de-camp who the governor may appoint from the personnel of the national guard to serve during his term of office. [1927, ch. 261, § 19, p. 510; am. 1931, ch. 186, § 3, p. 310; I.C.A., § 45-114; am. 1950 (E.S.), ch. 24, § 1, p. 35; am. 1957, ch. 174, § 13, p. 312.]



**Compiler's notes.** Section 2 of S.L. 1950 (E.S.), ch. 24 provided for abolition of the adjutant general's contingent fund, as of June 30, 1950, and for transfer of the unencumbered balance to the general fund.

Section 21 of S.L. 1927, ch. 261 is compiled as § 46-202.

Section 4 of S.L. 1931, ch. 186 is compiled as § 46-205.

Section 3 of S.L. 1950 (E.S.), ch. 24 is compiled as § 46-303.

Section 14 of S.L. 1957, ch. 174 repealed § 46-115.

Section 15 of S.L. 1957, ch. 174 is compiled as § 46-201.

## 46-115. Assistant adjutant general — Duties. [Repealed.]

**Compiler's notes.** This section which comprised S.L. 1927, ch. 261, § 20, p. 510; I.C.A.,

§ 45-115, was repealed by S.L. 1957, ch. 174, § 14, p. 312.

## CHAPTER 2

### OFFICERS AND ENLISTED MEN

#### SECTION.

46-201. Officers — Warrant officers — Enlistment of personnel — Power of governor.

46-202. Commissioned officers — Appointment and commission — Oath — Temporary appointments.

46-203. Rank of officers.

46-204. Promotion, when effective.

46-205. Vacation of commission — Discharge.

46-206. Retirement of officers — Time of service.

46-207. Retiring officer responsible for state property — Status pending settlement of accounts.

46-208. Arrest of officers and enlisted personnel.

46-209. Disobedience of orders — Trespass upon military property — Prohibition and abatement of nuisances.

46-210. Enlistment — Contract and oath.

#### SECTION.

46-211. Enlistment — Period and requirements — Reenlistment.

46-212. Enlisted personnel — Discharge papers.

46-213. Enlisted personnel — Transfers.

46-214. Retirement of enlisted personnel.

46-215. Accounting for property upon discharge.

46-216. Leave of absence from regular duties for field training — Exceptions.

46-217 — 46-223. [Repealed.]

46-224. Entitled to restoration of position after leave of absence for military training.

46-225. Vacation, sick leave, bonus and advancement unaffected by leave of absence.

46-226. Noncompliance of employer entitling employee to damages or equitable relief.

**46-201. Officers — Warrant officers — Enlistment of personnel — Power of governor.** — The governor is hereby authorized to appoint officers and warrant officers in such numbers and in such grades, and to cause to be enlisted such numbers of enlisted personnel and airmen in the army and air national guard of this state, as are authorized by the secretary of defense, under the national defense act and the rules and regulations promulgated thereunder. [1927, ch. 261, § 17, p. 510; I.C.A., § 45-201; am. 1957, ch. 174, § 15, p. 312.]

**Compiler's notes.** Sections 16 and 18 of S.L. 1927, ch. 261 are compiled as §§ 46-112 and 46-113, respectively.

Section 13 of S.L. 1957, ch. 174, is compiled as § 46-114.

Section 14 of S.L. 1957, ch. 174 repealed § 46-115.

**Cross ref.** Constitutional authorization, Const., Art. 14, § 3.

National defense act, see Compiler's note, § 46-101.

Workmen's compensation law applies to Idaho national guard while on duty, § 72-205.

**Collateral References.** 6 C.J.S., Armed Services, § 293.

Selective training and service acts. 129 A.L.R. 1171; 147 A.L.R. 1313; 148 A.L.R. 1388; 149 A.L.R. 1457; 150 A.L.R. 1420; 151 A.L.R. 1456; 152 A.L.R. 1452; 153 A.L.R.

1422; 154 A.L.R. 1448; 155 A.L.R. 1452; 156 A.L.R. 1450; 157 A.L.R. 1450; 158 A.L.R. 1450.

Members of militia as entitled to benefit of war legislation in nature of moratory statute. 137 A.L.R. 1380; 147 A.L.R. 1311.

**46-202. Commissioned officers — Appointment and commission — Oath — Temporary appointments.** — All commissioned officers shall be appointed by the governor as commander-in-chief, and be commissioned according to the grade in the department, corps, or arm of the service in which they are appointed, and shall be assigned to duty by the commander-in-chief. They shall take and subscribe to the following oath:

"I \_\_\_\_\_ do solemnly swear (or affirm) that I will support and defend the constitution of the United States and the constitution of the state of Idaho against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey orders of the president of the United States and the governor of the state of Idaho, that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of \_\_\_\_\_ in the national guard of the state of Idaho upon which I am about to enter, so help me God."

The appointment of officers in the national guard shall be temporary until such appointees shall have been federally recognized under the provisions of the national defense act. Any officer so temporarily appointed as an officer of the national guard of this state is hereby authorized to exercise all powers of his office during the time said temporary appointment shall remain in force. Such temporary appointment shall expire upon written notice from the national guard bureau that federal recognition has been denied and upon receipt of said notice the governor is authorized and is hereby directed to discharge such temporary officer from the national guard; provided, that the provisions of this section shall not apply to officers of such forces of the organized and unorganized militias which may be called into active service of the state. [1927, ch. 261, § 21, p. 510; I.C.A., § 45-202; am. 1957, ch. 174, § 16, p. 312.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Section 19 of S.L. 1927, ch. 261 is compiled as § 46-114 and § 20 was repealed by S.L. 1957, ch. 174, § 14.

**Cross ref.** Equipment of officers, § 46-301.

National defense act, see Compiler's note, § 46-101.

**Collateral References.** Liability of officer for injury from discharge of firearms by militiaman during military exercise. 49 A.L.R.3d 762.

**46-203. Rank of officers.** — All officers of the national guard of this state shall take precedence or relative rank, as determined by the federal laws and the rules and regulations promulgated thereunder. [1927, ch. 261, § 22, p. 510; I.C.A., § 45-203; am. 1957, ch. 174, § 17, p. 312.]

**46-204. Promotion, when effective.** — When a commissioned officer or warrant officer of the national guard is promoted to higher grade and accepts same, the promotion shall not be effective until the officer has



qualified for the higher office by examination as required under the provisions of the national defense act. [1927, ch. 261, § 23, p. 510; I.C.A., § 45-204; am. 1957, ch. 174, § 18, p. 312.]

**46-205. Vacation of commission — Discharge.** — Commissions of officers of the national guard shall be vacated upon resignation duly accepted by the governor; for absence without leave for three (3) months; upon the recommendation of an efficiency board approved by the governor as provided by national guard regulations; pursuant to the sentence of a general court-martial after the approval thereof by the governor, imposing sentence of dismissal; or when an officer has been convicted in a civil court of any crime of the grade of felony; upon withdrawal of federal recognition by the secretary of the army or the secretary of the air force; provided, that a formal discharge shall not be given to any officer of the national guard until he shall have given a satisfactory clearance for all property belonging to the state or to the United States issued for the use in the military service by the national guard for which he is accountable or responsible, or both; and if discharge from the service of the national guard of the state shall be given before such satisfactory clearance for the responsibility of said property has been given, then such discharge shall [be] and is hereby declared null and void. [1927, ch. 261, § 24, p. 510; am. 1931, ch. 186, § 4, p. 310; I.C.A., § 45-205; am. 1939, ch. 50, § 3, p. 91; am. 1957, ch. 174, § 19, p. 312.]

**Compiler's notes.** The bracketed word "be" in the last sentence was inserted by the compiler.

Section 3 of S.L. 1931, ch. 186 is compiled

as § 46-114, §§ 5 and 6 were repealed and § 7 is compiled as § 46-802.

Section 2 of S.L. 1939, ch. 50 is compiled as § 46-113 and §§ 4 and 5 were repealed.

**46-206. Retirement of officers — Time of service.** — Any officer of the national guard who loses his federal recognition because of mandatory retirement may be advanced one (1) grade and may be placed upon the retired list by order of the governor as commander-in-chief. Any commissioned officer who has served as an officer in the national guard of Idaho for a period of twenty (20) years, upon his request, may be advanced one (1) grade, and placed upon the retired list. Any commissioned officer who has a total service in the armed forces of the United States and in the national guard of Idaho of fifteen (15) years, may upon his request be advanced one (1) grade and retired. [1927, ch. 261, § 25, p. 510; I.C.A., § 45-206; am. 1957, ch. 174, § 20, p. 312; am. 1978, ch. 54, § 2, p. 101.]

**Compiler's notes.** Sections 1 and 3 of S.L. 1978, ch. 54 are compiled as §§ 46-113 and 46-208, respectively.

**46-207. Retiring officer responsible for state property — Status pending settlement of accounts.** — A commissioned officer responsible or accountable for state funds or state property, or property or funds of the United States, intended and issued for use in the military service, issued or entrusted to him by the adjutant general or the United States property and

fiscal officer, or acquired by transfer, inventory, or purchase, from any state fund or from any annual allowance of state funds or acquired in any other manner, who may tender his resignation and whose accounts are not settled, may be relieved from active duty and held as a supernumerary officer pending settlement of his accounts; and when so relieved from active duty the office in which he is so commissioned or to which he has been assigned shall be considered as vacated: provided, that a commissioned officer so held as a supernumerary officer shall be amenable to court-martial for military offenses to the same extent and in like manner as if upon the active list of officers. [1927, ch. 261, § 26, p. 510; I.C.A., § 45-207; am. 1957, ch. 174, § 21, p. 312.]

**46-208. Arrest of officers and enlisted personnel.** — Officers and enlisted personnel of the national guard not in the service of the United States may be placed in arrest by superiors as provided for in the Idaho code of military justice. [1927, ch. 261, § 27, p. 510; I.C.A., § 45-208; am. 1957, ch. 174, § 22, p. 312; am. 1978, ch. 54, § 3, p. 101.]

**Compiler's notes.** The Code of Military Justice referred to in this section is compiled as §§ 46-1101 — 46-1194.

Sections 2 and 4 of S.L. 1978, ch. 54 are compiled as §§ 46-206 and 46-314, respectively.

**46-209. Disobedience of orders — Trespass upon military property — Prohibition and abatement of nuisances.** — Any officer or enlisted person failing to appear upon any occasion of duty to which he shall be ordered by his proper commanding officer, without good and sufficient cause therefore [therefor], shall be subject to a trial by a court-martial and upon conviction, shall be sentenced as such court-martial may direct. The commanding officer may on any occasion of duty place in arrest during the continuance thereof any person who shall trespass upon the camp grounds, parade grounds, armory, or other place devoted to said duty or shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms, or shall disturb or prevent the passage of troops going to or returning from any duty. He may prohibit and prevent the sale or use of beer and intoxicating liquors and all gambling within the limits of the post, camp grounds, place of encampment, parade, or drill ground under his command, or within such limits not exceeding one (1) mile therefrom as he may prescribe. After orders prohibiting the same shall have been issued and posted, he may in his discretion abate as a common nuisance all such sales and he may place in arrest any person doing any of the foregoing things in violation of said orders within the limits named therein. [1927, ch. 261, § 28, p. 510; I.C.A., § 45-209; am. 1957, ch. 174, § 23, p. 312.]

**Compiler's notes.** The bracketed word "therefor" was inserted by the compiler.

**46-210. Enlistment — Contract and oath.** — Every person enlisting in the national guard shall sign an enlistment contract, and take and subscribe to the oath of enlistment prescribed by the national defense act



and regulations issued thereunder. [1927, ch. 261, § 29, p. 510; I.C.A., § 45-210; am. 1957, ch. 174, § 24, p. 312.]

**Cross ref.** Eligibility to enrollment in militia, Const., Art. 14, § 1; Code, § 46-102.

Equipment for enlisted men, § 46-302.

National defense act, see Compiler's note, § 46-101.

**Collateral References.** 57 C.J.S., Militia, § 12.

**46-211. Enlistment — Period and requirements — Reenlistment.** — Hereafter the period and requirements of enlistment and reenlistment in the national guard of this state shall be the same as prescribed by the national defense act and the regulations issued thereunder. [1927, ch. 261, § 30, p. 510; I.C.A., § 45-211; am. 1957, ch. 174, § 25, p. 312.]

**Cross ref.** National defense act, see Compiler's note, § 46-101.

**Collateral References.** 6 C.J.S., Armed Services, § 290.

**46-212. Enlisted personnel — Discharge papers.** — An enlisted person discharged from the service of the national guard shall receive a discharge therefrom in writing, in such form and with such classification as is or shall be prescribed by the national defense act and regulations issued thereunder: provided, that the provisions of this section shall not apply to the discharge of any member of the unorganized militia called into the active service of the state. [1927, ch. 261, § 31, p. 510; I.C.A., § 45-212; am. 1957, ch. 174, § 26, p. 312.]

**Compiler's notes.** Section 32 of S.L. 1927, ch. 261 is compiled as § 46-609.

**Collateral References.** 6 C.J.S., Armed Services, § 292.

**46-213. Enlisted personnel — Transfers.** — Enlisted personnel of the national guard may be transferred upon their own application from one (1) organization to another in the same manner as prescribed in the federal regulations of the department of the army and the department of the air force. Transfers of enlisted persons and of noncommissioned officers may be made from one (1) organization to another or from one (1) arm of the service to another, when in the judgment of the adjutant general the interests of the service demand such transfers; provided, that commanders of regiments, groups, separate squadrons, or separate battalions in the active service of the state may make such transfers within their regiment, group, separate squadron, or separate battalion as they may deem advisable for the good of the service. [1927, ch. 261, § 33, p. 510; I.C.A., § 45-213; am. 1957, ch. 174, § 27, p. 312.]

**Compiler's notes.** Section 34 of S.L. 1927, ch. 261 is compiled as § 46-216.

**46-214. Retirement of enlisted personnel.** — The governor may place upon the retired list any enlisted personnel of the national guard of Idaho who shall apply to the adjutant general for such retirement after said

enlisted person shall have well and faithfully served fifteen (15) years in armed forces of the United States including the reserve components thereof. Such enlisted person may be advanced one (1) grade but not to exceed the grade of master sergeant. [1927, ch. 261, § 76, p. 510; I.C.A., § 45-214; am. 1957, ch. 174, § 28, p. 312.]

**Compiler's notes.** Sections 75 and 77 of S.L. 1927, ch. 261 are compiled as §§ 46-610 and 46-304, respectively.

**46-215. Accounting for property upon discharge.** — An enlisted person who has not returned or properly accounted for all the public property belonging to the state or to the United States, issued for use in the military service, and for which he is responsible, shall not receive a full and complete discharge from the national guard of this state: provided, that if a discharge for any enlisted man shall have been given before the return of or proper accounting for said property for which he is responsible, then said discharge shall be and is hereby declared null and void. [1927, ch. 261, § 78, p. 510; I.C.A., § 45-215; am. 1957, ch. 174, § 29, p. 312.]

**Compiler's notes.** Sections 77 and 79 of S.L. 1927, ch. 261 are compiled as §§ 46-304 and 46-802, respectively.

**46-216. Leave of absence from regular duties for field training — Exceptions.** — All officers and employees of the state of Idaho who shall be members of the national guard or who shall be reservists in the armed forces of the United States, shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days during which they shall be engaged in field training ordered or authorized under the provisions of the national defense act; provided that this shall not apply to any period of time spent in active service of the United States, except that a period of fifteen (15) days or less in reserve training in any one (1) calendar year shall not be considered time spent in active service of the United States, for the purposes of this act. [1927, ch. 261, § 34, p. 510; I.C.A., § 45-216; am. 1957, ch. 174, § 30, p. 312.]

**Compiler's notes.** Sections 35-40 of S.L. 1927, ch. 261, formerly compiled as §§ 46-217 — 46-222, were repealed by S.L. 1957, ch. 174, §§ 31-36, respectively.

Section 37 of S.L. 1957, ch. 174 repealed § 46-223.

Section 41 of S.L. 1927, ch. 261 and section 38 of S.L. 1957, ch. 174 are compiled as § 46-301.

**Cross ref.** National defense act, see Compiler's note, § 46-101.

**46-217 — 46-222. Enlistment — Contract and oath — Period and requirements — Reenlistment — Enlisted Men — Discharge papers — Enlisted men and noncommissioned officers — Transfers — Noncommissioned officers —**



### **Appointment, number and transfer — Retirement of enlisted men. [Repealed.]**

**Compiler's notes.** These sections, which comprised S.L. 1927, ch. 261, §§ 35-40, p. 510; I.C.A., §§ 45-217 — 45-222, were re-

pealed by S.L. 1957, ch. 174, §§ 31-36, respectively.

### **46-223. Leave of absence from regular duties for field training. [Repealed.]**

**Compiler's notes.** This section which comprised I.C.A., § 45-223, as added by 1939, ch. 50, § 4, p. 91; am. 1941, ch. 59, § 1, p. 119;

am. 1947, ch. 195, § 1, p. 472; am. 1953, ch. 126, § 1, p. 197 was repealed by S.L. 1957, ch. 174, § 37, p. 312.

**46-224. Entitled to restoration of position after leave of absence for military training.** — Any person who is a duly qualified member of the national guard or of the reserve components of the armed forces, who is a member of an organized unit and who, in order to receive military training with the armed forces of the United States, not to exceed fifteen (15) days in any one (1) calendar year, leaves a position other than employment of a temporary nature in the employ of any employer, and who shall give evidence defining date of departure and date of return for purposes of military training ninety (90) days prior to the date of departure and who shall further give evidence of the satisfactory completion of such training immediately thereafter, and who is still qualified to perform the duties of such position, shall be entitled to be restored to his previous or similar position with the same status, pay and seniority. Such seniority shall continue to accrue during such period of absence, and such period of absence for military training shall be construed as an absence without leave and within the discretion of the employer. Said leave may be with or without pay. [1955, ch. 202, § 1, p. 434.]

**46-225. Vacation, sick leave, bonus and advancement unaffected by leave of absence.** — Such absence for military training shall not affect the employee's right to receive normal vacation, sick leave, bonus, advancement, and other advantages of his employment normally to be anticipated in his particular position. [1955, ch. 202, § 2, p. 434.]

**46-226. Noncompliance of employer entitling employee to damages or equitable relief.** — If any employer fails to comply with any of the provisions of this act, the employee may, at his election, bring an action at law for damages for such noncompliance or apply to the district court for such equitable relief as may be just and proper under the circumstances. [1955, ch. 202, § 3, p. 434.]

**Compiler's notes.** The words "this act" refer to S.L. 1955, ch. 202 compiled as §§ 46-224 — 46-226.

## CHAPTER 3

### EQUIPMENT AND ALLOWANCES

## SECTION.

46-301. Equipment of organizations — Commissioned officers.

46-302. Equipment for enlisted personnel — Punishment for unlawful use.

46-303. Personal responsibility for money and property.

46-304. Disposal of equipment — Unauthorized use of insignia — Penalties.

46-305. Lost or damaged equipment — Liability of responsible officer.

## SECTION.

46-306. Loss or damage to property — Liability of responsible enlisted person.

46-307. Uniforms prescribed.

46-308. [Repealed.]

46-309. Allowance for military expenses.

46-310. Officers' annual allowance.

46-311 — 46-313. [Repealed.]

46-314. Educational encouragement.

#### **46-301. Equipment of organizations — Commissioned officers. —**

All organizations of the national guard shall be equipped with such arms, equipment and such other supplies as may be furnished to the state under the provisions of the national defense act. The commanding officer of any organization or detachment of the national guard of this state to which such property of the United States has been issued for use in military service shall keep said property in proper repair, in good condition, and is hereby charged with the proper custody and safekeeping thereof. [1927, ch. 261, § 41, p. 510; I.C.A., § 45-301; am. 1957, ch. 174, § 38, p. 312.]

**Compiler's notes.** Section 34 of S.L. 1927, ch. 261 and section 30 of S.L. 1957, ch. 174 are compiled as § 46-216.

Sections 35-40 of S.L. 1927, ch. 261, formerly compiled as §§ 46-217 — 46-222, were repealed by S.L. 1957, ch. 174, §§ 31-36, respectively.

Section 37 of S.L. 1957, ch. 174 repealed § 46-223.

**Cross ref.** National defense act, see Compiler's note, § 46-101.

Officers' annual allowance to assist in uniforming and equipping themselves, § 46-310.

State flag, § 46-801.

**Collateral References.** 6 C.J.S., Armed Services, § 296.

**46-302. Equipment for enlisted personnel — Punishment for unlawful use. —** Uniforms and equipment for enlisted men of the national guard shall be furnished as prescribed in the national defense act, and the rules and regulations prescribed thereunder; provided, that arms, clothing and equipment issued to the national guard shall be used only for the purpose for which issued, and under the rules and regulations prescribed under the provisions of the national defense act, and any enlisted person using said arms, clothing or equipment without proper authority for purposes other than that for which said property was issued shall be punished as a court-martial may direct. [1927, ch. 261, § 42, p. 510; I.C.A., § 45-302; am. 1957, ch. 174, § 39, p. 312.]

**Compiler's notes.** Section 43 of S.L. 1927, ch. 261 is compiled as § 46-305.

**Cross ref.** National defense act, see Compiler's note, § 46-101.

**46-303. Personal responsibility for money and property. —** Every officer or enlisted person of the national guard to whom public property of the state or of the United States has been issued shall be personally



responsible to the state for such property, and no one shall be relieved from such responsibility except it be shown by the action of the surveying officer, approved by the governor in the case of state property, and by the secretary of the army or the secretary of the air force, in the case of United States property, that the loss, damage to, or destruction of such property was unavoidable and in no way the fault of the person responsible for the same. In all other cases the value of the property, or the amount of damage thereto, shall be charged against the person at fault and such person shall pay the value of said property, or the value of the damage thereto, to the adjutant general within thirty (30) days after the approval of the findings of the surveying officer as provided herein, to the adjutant general. All moneys paid to the adjutant general for state property under the provisions of this section shall be paid into the state treasury and credited to the general fund. All moneys received by the adjutant general for property of the United States under provisions of this section, shall be disposed of in accordance with the provisions of the applicable federal law and regulations issued thereunder. [1927, ch. 261, § 74, p. 510; I.C.A., § 45-303; am. 1950 (E. S.), ch. 24, § 3, p. 35; am. 1957, ch. 174, § 40, p. 312.]

**Compiler's notes.** Sections 73 and 75 of S. L. 1927, ch. 261 are compiled as §§ 46-607 and 46-610, respectively.

Sections 1 and 4 of S.L. 1950 (E. S.), ch. 24 are compiled as §§ 46-114 and 46-305, respectively.

Section 2 of S.L. 1950 (E. S.), ch. 24 provided for abolition of the adjutant general's contingent fund, as of June 30, 1950, and for transfer of the unencumbered balance to the general fund.

**46-304. Disposal of equipment — Unauthorized use of insignia — Penalties.** — Any person who shall secrete, sell, dispose of, offer for sale, purchase, retain, after demand made by a commissioned officer of the national guard of this state, or in any manner pawn or pledge any arms, uniforms, equipment or other military property that is the property of either the state or the United States, and any person who shall wear without consent of his immediate commanding officer, any uniform or any device or insignia of any design or character used as a designation of grade, rank, or office such as are by law or by regulation duly promulgated prescribed for the use of the national guard except the national guard of any other state or territory, officers of the independent military organizations so designated in section 46-802, members of associations wholly composed of soldiers honorably discharged from the service of the United States and members of the sons of veterans, or of the boy scouts, shall be guilty of a misdemeanor, and upon conviction, fined in any sum not less than five dollars (\$5.00), nor more than \$100, and in addition thereto, shall forfeit to the state \$100 for each separate offense to be sued for in the name of the people by the attorney general. [1927, ch. 261, § 77, p. 510; I.C.A., § 45-304; am. 1957, ch. 174, § 41, p. 312.]

**Compiler's notes.** Sections 76 and 78 of S. L. 1927, ch. 261 are compiled as §§ 46-214 and 46-215, respectively.

**46-305. Lost or damaged equipment — Liability of responsible officer.** — If it should appear to the adjutant general that any arms, clothing, or equipment or other property of the state or of the United States has not been safely or properly stored within its limits and to the extent of the facilities available for such storage purposes, or to have been damaged, or lost through neglect or to have been disposed of in any manner, or used for purposes other than those for which said property was issued, and a surveying officer shall find that the officer in command of the organization or detachment is responsible for the damage or damages occurring to said property through neglect or by reason of failure in carrying out his instructions as to care, use, or safekeeping of said property, the responsible officer shall pay to the adjutant general the amount of damage or damages assessed by the surveying officer. If the responsible officer shall fail to make such payment within thirty (30) days from date of mailing of notice by the adjutant general that such payment for damage has been assessed against said officer, the adjutant general through the attorney general shall prosecute upon the bond given by the responsible officer: provided, that no damage or damages shall be assessed against any officer in excess of the price to be charged for said article as prescribed by the department of the army or department of the air force in the case of property of the United States, nor for a greater amount than the actual cost of the articles when purchased in the case of state property. All sums received for loss or damage to state property shall be paid into the state treasury and credited to the general fund; and all sums received for loss or damage to property of the United States shall be disposed of in accordance with the provisions of the applicable federal law and regulations issued thereunder. [1927, ch. 261, § 43, p. 510; I.C.A., § 45-305; am. 1950 (E. S.), ch. 24, § 4, p. 35; am. 1957, ch. 174, § 42, p. 312.]

**Compiler's notes.** Section 5 of S.L. 1950 (E. S.), ch. 24, formerly compiled as § 46-511, was repealed by S.L. 1975, ch. 147, § 1.

**46-306. Loss or damage to property — Liability of responsible enlisted person.** — The responsibility for the loss or damage of any property of the state or of the United States, lost or damaged through unlawful use, neglect, or carelessness [carelessness] on the part of any enlisted person, may be submitted to the action of a surveying officer, and if the findings of said officer is adverse to the enlisted person the latter shall be called upon by his organization commander or detachment commander to render payment for same, and in the event that said payment shall not be made within the thirty (30) days, the enlisted person shall be punished as a court-martial may direct: provided, that charges for loss or damage to property belonging to the United States may be entered on the payroll and charged against the enlisted person, without the action of a surveying officer in the manner and under the rules and regulations prescribed under the national defense act.

In case any enlisted person shall refuse to sign a statement of charges on property for entry on the payrolls, after a surveying officer shall have found



such enlisted person responsible for such damage or loss of any property of the state or the United States, such enlisted person shall be brought to trial and punished as a court-martial may direct. [1927, ch. 261, § 44, p. 510; I.C.A., § 45-306; am. 1957, ch. 174, § 43, p. 312.]

**Compiler's notes.** The bracketed word "carelessness" in the first paragraph was inserted by the compiler.

**46-307. Uniforms prescribed.** — Commissioned officers and enlisted personnel of the national guard shall wear only such uniforms as are prescribed by the secretary of the army and the secretary of the air force, when said officers and enlisted personnel are performing duties required of officers and enlisted personnel of the national guard of this state. [1927, ch. 261, § 45, p. 510; I.C.A., § 45-307; am. 1957, ch. 174, § 44, p. 312.]

**46-308. Officers responsible for money or property — Bond.** [Repealed.]

**Compiler's notes.** This section, which comprised S.L. 1927, ch. 261, § 50, p. 510; I.C.A., § 45-308; am. 1957, ch. 174, § 45, p. 312; am. 1971, ch. 136, § 32, p. 522 was repealed by S.L. 1978, ch. 54, § 7.

**46-309. Allowance for military expenses.** — The county commissioners of each county may at their discretion expend annually not to exceed \$1,200 out of the county current expense fund for repairs, rent, maintenance, and operation of armory buildings and air facilities and for maintenance and improvement of armory building sites and sites for air facilities or other necessary expenditure for military purposes. [1927, ch. 261, § 46, p. 510; I.C.A., § 45-309; am. 1957, ch. 174, § 46, p. 312.]

**Collateral References.** 53 Am. Jur. 2d, Military, and Civil Defense, §§ 37, 38.  
6 C.J.S., Armed Services, § 296.

**46-310. Officers' annual allowance.** — All officers shall receive annually such sum as may be directed by the commander-in-chief, not to exceed one hundred dollars (\$100), to assist in uniforming and equipping such officers: provided, no officer shall receive more money toward such equipment than he has expended for purchase and maintenance during the last preceding year: provided, where an officer expends a greater amount than the annual allowance for the year, such excess may be included in voucher for the succeeding year. [1927, ch. 261, § 47, p. 510; I.C.A., § 45-310; am. 1957, ch. 174, § 47, p. 312.]

**Compiler's notes.** Sections 48 and 49 of S.L. 1927, ch. 261, formerly compiled as §§ 46-311 and 46-312, were repealed by S.L. 1957, ch. 174, §§ 48 and 49, respectively, and § 50, formerly compiled as § 46-308, was repealed by S.L. 1978, ch. 54, § 7.

Section 50 of S.L. 1957, ch. 174 repealed § 46-313, §§ 51-57 of S.L. 1957, ch. 174 were

repealed by S.L. 1975, ch. 147, § 1 and § 58 of S.L. 1957, ch. 174 is compiled as § 46-601.

**Collateral References.** 6 C.J.S., Armed Services, § 293.

Constitutionality of retroactive statute providing compensation for death in service of state. 22 A.L.R. 1445; 28 A.L.R. 1100.

Minor's right to wages or similar payments

for enlistment or military services. 137 A.L.R. 1491; 147 A.L.R. 1311; 151 A.L.R. 1455; 153 A.L.R. 1420; 155 A.L.R. 1451; 157 A.L.R. 1449.

**46-311, 46-312. Artillery and cavalry — Allowance for hire of horses — Military expenses — Annual allowance to companies — Additional allowance by county commissioners. [Repealed.]**

**Compiler's notes.** These sections which comprised S.L. 1927, ch. 261, §§ 48, 49, p. 510; I.C.A., §§ 45-311, 45-312 were repealed by S.L. 1957, ch. 174, §§ 48, 49, respectively.

**46-313. Officers' annual allowance. [Repealed.]**

**Compiler's notes.** This section which comprised S.L. 1911, ch. 72, § 39, p. 213; reen. C.L. 37:42; C.S., § 723; I.C.A., § 45-313, was repealed by S.L. 1957, ch. 174, § 50, p. 312.

**46-314. Educational encouragement. —** The adjutant general of the Idaho national guard is authorized to encourage recruitment and retention of nontechnician national guardsmen by providing incentive payments as set forth hereinafter. The adjutant general may authorize the payment of not more than one hundred percent (100%) of student registration fees or tuition for each semester for each member of the active Idaho national guard who attends a public or private institution of higher education in Idaho, a vocational education school, or a community college organized under the provisions of chapter 21, title 33, Idaho Code. To be eligible to receive benefits, an individual must be a member in good standing of the active Idaho national guard at the beginning of and throughout the entire semester for which benefits are received. [1974, ch. 134, § 1, p. 1338; am. 1977, ch. 37, § 1, p. 69; am. 1978, ch. 54, § 4, p. 101; am. 1998, ch. 294, § 1, p. 975; am. 2001, ch. 322, § 1, p. 1137.]

**Compiler's notes.** Sections 3 and 5 of S.L. 1978, ch. 54 are compiled as §§ 46-208 and 46-406, respectively.

## CHAPTER 4

### IMMUNITIES AND PRIVILEGES

#### SECTION.

- 46-401. Immunity from arrest.  
46-402. Immunity for acts done in performance of duty.  
46-403. Equipment exempt from civil process.  
46-404. Right of way in streets — Penalties.

#### SECTION.

- 46-405. Exemption from toll in performance of duties.  
46-406. Exemption from jury duty.  
46-407. Reemployment rights.  
46-408. Security of the orchard training area.  
46-409. The militia civil relief act.

**46-401. Immunity from arrest. —** Members of the Idaho national guard, when said guard is in the service of the United States, or the state of Idaho, shall not be arrested on any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty. [1927, ch. 261, § 51, p. 510; I.C.A., § 45-401.]



**Cross ref.** Arrest by member of national guard, § 46-1108.

**Arrest by superior officers,** § 46-208.

**Collateral References.** 6 C.J.S., Armed Services, §§ 297, 298.

**Exemption of member of armed forces from service of civil process.** 137 A.L.R. 1372; 149 A.L.R. 1455; 150 A.L.R. 1419; 151 A.L.R. 1454; 153 A.L.R. 1419; 156 A.L.R. 1449; 158 A.L.R. 1450.

**46-402. Immunity for acts done in performance of duty.** — Members of the Idaho national guard ordered into active service of the state by any proper authority shall not be liable in any court of this state, either civil or criminal for any acts done by them in performance of their duty. When suit or proceedings shall be commenced in any court by any person against any officer of the national guard of this state, for any act done by such officer in his official capacity, in the discharge of any duty under this act; or against any person acting under the authority or order of any such officer, or by virtue of any warrant issued by him pursuant to law, the defendant may require the person prosecuting or instituting the suit or proceedings, to file security for the payment of costs that may be awarded to the defendant therein. In case the plaintiff shall be nonsuited or have a verdict or judgment rendered against him, the defendant shall recover treble costs. [1927, ch. 261, § 52, p. 510; I.C.A., § 45-402.]

**Purpose.**

This section is a grant of immunity limited to members of the National Guard while ordered into active service of the state. *Baca v. State*, 119 Idaho 782, 810 P.2d 720 (1991).

**Collateral References.** Officers or privates in military service as officers or employees within a statute waiving a state's immunity from liability for torts. 129 A.L.R. 911.

Liability for injury or damages resulting

from traffic accident involving a vehicle operated in military service. 133 A.L.R. 1298; 147 A.L.R. 1431.

Civil liability of soldiers, sailors and militiamen. 135 A.L.R. 10; 147 A.L.R. 1429; 151 A.L.R. 1463; 153 A.L.R. 1432; 154 A.L.R. 1457; 158 A.L.R. 1462.

Liability for injury by firearms in the course of a military exercise, use of firearms in such case as a nuisance. 49 A.L.R.3d 762.

**46-403. Equipment exempt from civil process.** — Uniforms, arms, and equipment, required by law or regulations to be owned by officers of the national guard of this state, and all uniforms, arms, equipment, or other property of state or the United States issued to said officers or enlisted men of the national guard of this state, for use in the military service shall be exempt from all suits, distresses, executions, or sales for debt or payment of taxes. [1927, ch. 261, § 53, p. 510; I.C.A., § 45-403.]

**Cross ref.** Equipment of organizations and personnel, §§ 46-301, 46-302.

**Collateral References.** 54 Am. Jur. 2d, Military, and Civil Defense, §§ 290-350.

Service of civil process, exemption of mem-

ber of armed forces from. 137 A.L.R. 1372; 149 A.L.R. 1455; 150 A.L.R. 1419; 151 A.L.R. 1454; 153 A.L.R. 1419; 156 A.L.R. 1449; 158 A.L.R. 1450.

**46-404. Right of way in streets — Penalties.** — The commanding officer of any portion of the Idaho national guard called into the active service of the state when performing any military duty in any street or highway, may require any or all persons in such street or highway to yield the right of way to said national guard: provided, that the carriage of United States mails, the legitimate functions of the police, and the progress and operations of hospitals, ambulances, fire engines, and fire departments shall

not be interfered with thereby. All others who shall hinder, delay, or obstruct any portion of the national guard on active duty in the service of the state in the performance of any military duty or who shall attempt to do so, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$100 nor more than \$1000 or by imprisonment for not less than three (3) months nor more than one year, or both. [1927, ch. 261, § 54, p. 510; I.C.A., § 45-404.]

**46-405. Exemption from toll in performance of duties.** — Any person belonging to the Idaho national guard going to or returning from any parade, encampment, drill or meeting which he may be required to attend under the laws and regulations for said national guard, shall, together with his conveyance and the military property of the state or of the United States, or both, in his charge, be allowed to pass free through all toll gates, and over all toll bridges, and ferries, if he is in uniform or if he presents an order for duty or a certificate from his commanding officer that he is a member of the Idaho national guard. [1927, ch. 261, § 55, p. 510; I.C.A., § 45-405.]

**46-406. Exemption from jury duty.** — Any member of the national guard shall be exempt from sitting or serving as juror in any of the courts of this state, provided he shall furnish the certificate of his immediate commanding officer that he has performed the duties required by his enlistment or commission. No member of the national guard of this state shall be required to serve on any posse comitatus. [1927, ch. 261, § 56, p. 510; I.C.A., § 45-406; am. 1978, ch. 54, § 5, p. 101.]

**Compiler's notes.** Sections 4 and 6 of S.L. 1978, ch. 54 are compiled as §§ 46-314 and 46-603, respectively.

**46-407. Reemployment rights.** — (a) Any member of the Idaho national guard who is ordered to duty by the governor and who at the time of such order to duty is employed by any employer other than the United States government, shall be entitled to reemployment upon release from duty, provided that:

- (1) The position in which he was employed was not a temporary position;
- (2) His release from duty was under honorable conditions;
- (3) He remains physically qualified for employment;
- (4) The period of duty did not exceed one (1) year; and
- (5) Application for reemployment is made within thirty (30) days subsequent to release from duty.

(b) If the member is still qualified to perform the duties of the position he held at the time of the order to duty, he shall be restored by the employer or the employer's successor in interest to that position or one of like seniority, status and pay. If the member is not qualified to perform the duties of such position by reason of disability sustained during the period of duty, but is qualified to perform the duties of any other positions in the employ of the employer, then the employer must offer the member that position which he



is qualified to perform which is most similar to his former position in seniority, status and pay.

(c) Any person who is reemployed under this section shall not be discharged without cause within one (1) year after such reemployment.

(d) If any employer fails or refuses to comply with this section, the district court in the county in which the member was employed shall have the power, upon petition by the member, to compel the employer to comply with this section and to compensate the member for lost wages and benefits, for costs of the action, and for reasonable attorney's fees. The court shall order a speedy hearing in any such case and advance it on the calendar. [I.C., § 46-407, as added by 1984, ch. 139, § 1, p. 327.]

**46-408. Security of the orchard training area.** — Employees of the military division of the state of Idaho who are performing security duties at the Orchard training area located in Ada and Elmore counties may, in addition to their power to protect and secure military property and persons, arrest and detain for civil law enforcement authorities, any person who commits a violation of the criminal laws of this state in their presence. Persons so detained shall be released to the custody of civil law enforcement authorities as soon as practicable. The employees hired to perform security duties at the Orchard training area shall complete level 1 POST academy training. Employees performing duties under this section are "employees" under sections 6-902, 6-903 and 6-917, Idaho Code, and are not excluded by the exceptions to governmental liability under section 6-904 4. or 5., Idaho Code. [I.C., § 46-408, as added by 2000, ch. 86, § 1, p. 188.]

**Compiler's notes.** Section 2 of S.L. 2000, January 1, 2000 and approved March 29, ch. 26 declared an emergency retroactively to 2000.

**46-409. The militia civil relief act.** — (1) As used in this section, the following terms have the following meanings:

(a) "Active member" means any member of the Idaho air or army national guard who is called or ordered by the governor for thirty (30) consecutive days or more to state active duty, or to duty other than for training under title 32 U.S.C.

(b) "Be called or ordered by the governor" means to be called or ordered by the governor for thirty (30) consecutive days or more to state active duty or to duty other than for training under title 32 U.S.C.

(c) "Duty other than for training" means any state active duty or title 32 U.S.C. duty other than training unless training is required as part of thirty (30) days of the consecutive duty upon the call or order of the governor. Duty other than for training does not include weekend drill, annual training (generally fifteen (15) days) as part of normal national guard service, and does not include attendance at military schools unless such attendance is required as part of, or occurs in conjunction with thirty (30) days of consecutive duty upon the call or order of the governor.

(d) "Employee" means any person employed by a public or private employer.

(e) "Soldiers' and sailors' civil relief act (SSCRA)" means the provisions of 50 App. U.S.C. section 501 et seq. which protects active military service members.

(f) "State active duty" means any active duty performed for thirty (30) consecutive days or more by an active member of the Idaho national guard in accordance with this title when called or ordered by the governor.

(g) "Uniform services employment and reemployment rights act of 1994 (USERRA)" means the provisions of 38 U.S.C. section 4301 et seq., which gives employees who leave a civilian job to perform military service the right to return to the civilian job held before entering military service with the rights to seniority, to purchase insurance coverage and purchase retirement credit.

(2) Whenever any active member of the Idaho national guard in time of war, armed conflict, or emergency proclaimed by the governor or by the president of the United States, shall be called or ordered by the governor to state active duty for a period of thirty (30) consecutive days or more, or to duty other than for training pursuant to title 32 U.S.C., the provision as then in effect of the soldiers' and sailors' civil relief act, 50 App. U.S.C. section 501 et seq., and the uniform services employment and reemployment rights act, 38 U.S.C. section 4301 et seq., shall apply.

(3) With reference to 50 App. U.S.C. section 581, the adjutant general or his designee shall be responsible to execute certificates of service referred to therein. [I.C., § 46-409, as added by 2003, ch. 251, § 21, p. 650.]

**Compiler's notes.** Former § 46-409, which comprised S.L. 2002, ch. 101, § 1, p. 276, was repealed by S.L. 2003, ch. 251, § 1, effective July 1, 2003.

Section 3 of S.L. 2003, ch. 251, is compiled as § 33-3719.

Section 5 of S.L. 2003, ch. 251 provided: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect when the

Governor enters an order, and files it with the Secretary of State, calling or ordering members of the Idaho National Guard to state active duty or to Title 32 U.S.C. duty other than for training as defined in Section 1 of this act, or on July 1, 2003, whichever occurs first."

**Sec. to sec. ref.** This section is referred to in § 32-717.

## CHAPTER 5

### SELECTIVE SERVICE REGISTRATION AWARENESS AND COMPLIANCE

#### SECTION.

46-501. Purpose of the chapter.

46-502. Legislative findings.

46-503. Eligibility for postsecondary education and financial assistance — Responsibility to verify compliance.

#### SECTION.

46-504. Eligibility for employment — Responsibility to verify compliance.

46-505. Exceptions to the requirements of this chapter.

**46-501. Purpose of the chapter.** — The purpose of this chapter is to encourage compliance with the federal military selective service act and to protect the eligibility of the citizens of this state who are subject to the provisions of the federal statute to receive federal financial assistance for postsecondary education and for employment with the executive branch of the federal government. The federal selective service registration awareness



and compliance act requires persons subject to the provisions of the federal military selective service act to be in compliance with the requirements of that federal statute as a condition of eligibility for enrollment at a state-supported institution of postsecondary education, or for state-supported scholarships, programs of financial assistance funded by state revenue including federal funds, gifts or grants accepted by the state, or for employment by the state or any political subdivision. [I.C., § 46-501, as added by 1999, ch. 375, § 1, p. 1024.]

**46-502. Legislative findings.** — The legislature of the state of Idaho finds that the military selective service act at 50 U.S.C. sec. 451 et seq. requires all male citizens and every other male person residing in the United States, except for lawfully admitted nonimmigrant aliens, upon reaching their eighteenth birthday to register with the United States selective service system. The legislature further finds that federal statutes limit eligibility for federal student financial assistance and eligibility for employment within the executive branch of the federal government to persons who are in compliance with the requirements of the federal military selective service act. [I.C., § 46-502, as added by 1999, ch. 375, § 1, p. 1024.]

**46-503. Eligibility for postsecondary education and financial assistance — Responsibility to verify compliance.** — (1) A person may not enroll in a state-supported institution of postsecondary education unless he is in compliance with the federal military selective service act.

(2) A person may not receive a loan, grant, scholarship or other financial assistance for postsecondary education funded by state revenue, including federal funds or gifts and grants accepted by this state, or receive a student loan guaranteed by the state unless he is in compliance with the federal military selective service act.

(3) It shall be the duty of all officials having charge of and authority over state-supported institutions of postsecondary education and over the granting of state-supported financial assistance for postsecondary education to assure themselves that applicants are in compliance with the federal military selective service act. The institutions are authorized to develop the necessary form to allow the applicant to certify compliance with the selective service act. [I.C., § 46-503, as added by 1999, ch. 375, § 1, p. 1024.]

**46-504. Eligibility for employment — Responsibility to verify compliance.** — (1) No male person who has attained the age of eighteen (18) years who fails to be in compliance with the federal selective service act shall be eligible for employment by or service for the state of Idaho, or a political subdivision of the state, including all boards and commissions, departments, agencies, institutions and instrumentalities.

(2) It shall be the duty of all officials having charge of and authority over hiring of employees by the state or political subdivisions of the state to assure themselves that applicants are in compliance with the federal military selective service act. The hiring authorities are authorized to develop the necessary form to allow the applicant to certify compliance with

the selective service act. [I.C., § 46-504, as added by 1999, ch. 375, § 1, p. 1024.]

**46-505. Exceptions to the requirements of this chapter.** — A person shall not be denied a right, privilege or benefit under this chapter by reason of failure to present himself for and submit to the requirement to register pursuant to the federal military selective service act if:

(1) The requirement for the person to so register has terminated or become inapplicable to the person; or

(2) The person is serving or has already served in the armed forces, or has a condition that would preclude acceptability for military service. [I.C., § 46-505, as added by 1999, ch. 375, § 1, p. 1024.]

## CHAPTER 6

### MARTIAL LAW AND ACTIVE DUTY

#### SECTION.

46-601. Authority of governor.

46-602. Proclamation of martial law.

46-603. Active duty — Idaho code of military justice in force — Court-martial — Additional jurisdiction.

46-604. Cooperation of militia with civil authorities — Calling out military forces.

46-605. Pay on active duty.

#### SECTION.

46-606. [Repealed.]

46-607. Pay on active duty — State liable for expenses and claims.

46-608. [Repealed.]

46-609. Officers and enlisted personnel on special duty — Compensation and allowances.

46-610. Military maneuvers and camps — Compensation.

**46-601. Authority of governor.** — (a) The governor shall have the power in the event of a state of extreme emergency to order into the active service of the state, the national guard, or any part thereof, and the organized militia, or any part thereof, or both as he may deem proper.

“State of extreme emergency” means: (1) the duly proclaimed existence of conditions of extreme peril to the safety of persons and property within the state, or any part thereof, caused by an enemy attack or threatened attack; or (2) the duly proclaimed existence of conditions of extreme peril to the safety of persons and property within the state, or any part thereof, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot or earthquake, insurrection, breach of the peace, which conditions by reason of their magnitude are or are likely to be beyond the control of the services, personnel, equipment and facilities of any county, any city, or any city and county.

(b) During a period of a state of extreme emergency, the governor shall have complete authority over all agencies of the state government, including all separate boards and commissions, and the right to exercise within the area or regions wherein the state of extreme emergency exists all police power vested in the state by the constitution and the laws of the state of Idaho. In the exercise thereof he is authorized to promulgate, issue and enforce rules, regulations and orders which he considers necessary for the protection of life and property. Such rules, regulations and orders shall, whenever practicable, be prepared in advance of extreme emergency and the governor shall cause widespread publicity and notice to be given of such



rules, regulations and orders. Rules, regulations and orders issued under the authority of this section and prepared in advance of a state of extreme emergency shall not become operative until the governor proclaims a state of extreme emergency. Such rules, regulations and orders shall be in writing and shall take effect upon their issuance. They shall be filed in the office of the secretary of state as soon as possible after their issuance. A copy of such rules, regulations and orders shall likewise be filed in the office of the county clerk of each county, any portion of which is included within the area wherein a state of extreme emergency has been proclaimed. Whenever the state of extreme emergency has been ended by either the expiration of the period for which it was proclaimed or the need for said state of extreme emergency has ceased, the governor shall declare the period of the state of extreme emergency to be at an end. [1927, ch. 261, § 4, p. 510; I.C.A., § 45-601; am. 1957, ch. 174, § 58, p. 312.]

**Compiler's notes.** Section 3 of S.L. 1927, ch. 261 is compiled as § 46-103.

Section 57 of S.L. 1957, ch. 174, formerly compiled as § 46-507, was repealed by S.L. 1975, ch. 147, § 1.

**Cited in:** *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

**Collateral References.** 53A Am. Jur. 2d,

Military, and Civil Defense, §§ 437-446.

Liability of a state for injury or damage resulting from traffic accident involving vehicle operated in military service. 133 A.L.R. 1298; 147 A.L.R. 1431.

Constitutionality of statute, and application thereof, conferring emergency powers on governor during wartime. 150 A.L.R. 1488.

**46-602. Proclamation of martial law.** — Whenever a state of extreme emergency has been proclaimed by the governor, the governor if in his judgment the maintenance of law and order will thereby be promoted, and in addition to the proclaiming of said state of extreme emergency, may by proclamation declare the state, county, or city, or any specified portion thereof, to be in a state of insurrection and may declare martial law therein. [1927, ch. 261, § 5, p. 510; I.C.A., § 45-602; am. 1957, ch. 174, § 59, p. 312.]

**Collateral References.** Power to declare martial law apart from military occupation or operations. 24 A.L.R. 1183.

**46-603. Active duty — Idaho code of military justice in force — Court-martial — Additional jurisdiction.** — Whenever any portion of the national guard of this state, or of the organized militia, or both, shall be on active duty or ordered to assemble for duty in time of war or state of extreme emergency, or for any other cause, all such military personnel shall be governed by and subject to the provisions of the Idaho code of military justice. Over all offenses committed by members of the national guard while under the provisions of the Idaho code of military justice as provided in this section, a court-martial shall possess in addition to the jurisdiction and power of sentence and punishment now vested in them, all additional jurisdiction and power of sentence and punishment exercisable by like courts under the Idaho code of military justice, but no punishment imposed under the Idaho code of military justice which shall extend to the taking of a life shall, in any case, be inflicted except in time of actual war, invasion or insurrection, declared by proclamation of the governor to exist, and then

only after the governor has approved such sentence. Imprisonment other than in the guardhouse shall be executed in jails or prisons designated by the governor for that purpose. [1927, ch. 261, § 6, p. 510; I.C.A., § 45-603; am. 1957, ch. 174, § 60, p. 312; am. 1978, ch. 54, § 6, p. 101.]

**Compiler's notes.** The Code of Military Justice referred to in this section is compiled as §§ 46-1101 — 46-1194.

Section 7 of S.L. 1927, ch. 261 is compiled as § 46-104.

Section 5 of S.L. 1978, ch. 54 is compiled as § 46-406 and § 7 repealed §§ 46-308, 46-608 and 46-804.

**Cross ref.** Jurisdiction and composition of courts-martial, §§ 46-1110—46-1114.

**46-604. Cooperation of militia with civil authorities — Calling out military forces.** — When the national guard or the organized militia shall be ordered into the active service of the state during a state of extreme emergency, or for any other cause, the commanding officer of the military personnel shall cooperate with the civil officers to the fullest extent, consistent with the accomplishment of the object, for which the military personnel were called; the civil officials may express to the commander of the military personnel the general or specific object which the civil officials desire to accomplish, but the tactical direction of the military personnel, the kind and extent of force to be used, and the particular means to be employed to accomplish the object specified by the civil officers are left solely to the officers in charge of the military personnel. In case of any breach of the peace, tumult, riot, resistance to process of this state, or a state of extreme emergency, or imminent danger thereof, the sheriff of a county may call for aid upon the commander-in-chief of the national guard. [1927, ch. 261, § 87, p. 510; I.C.A., § 45-604; am. 1957, ch. 174, § 61, p. 312.]

**Compiler's notes.** Section 86 of S.L. 1927, ch. 261 is compiled as § 46-705 and §§ 88-92 have been repealed.

**46-605. Pay on active duty.** — When the national guard or any part thereof is ordered on active duty in the service of the state, the enlisted personnel, the commissioned officers and warrant officers so ordered shall be entitled to pay of fifty-five dollars (\$55.00) per day or shall be entitled to the same pay as enlisted personnel, officers and warrant officers of like grade and length of service in the armed forces of the United States, whichever sum is greater, and they shall be entitled to the same allowances as enlisted personnel, officers and warrant officers of like grade and length of service in the armed forces of the United States. All payments of pay and allowances under this section shall be made by the adjutant general. No deductions shall be made from the pay of officers or enlisted personnel in active service of the state for dues or other financial obligations imposed by any bylaw, rules or regulations of a civil character. When lodging or meals, or both, cannot be provided by the state, the adjutant general may pay a per diem in addition to the pay and allowances. Nothing in this section shall preclude officers or enlisted personnel in active service of the state from accepting, in lieu of the pay entitlement provided above, greater pay and allowances that may be available from any other government department or



agency through cooperative agreement or otherwise. [1927, ch. 261, § 71, p. 510; I.C.A., § 45-605; am. 1957, ch. 174, § 62, p. 312; am. 1974, ch. 135, § 1, p. 1339; am. 1996, ch. 411, § 1, p. 1372; am. 2003, ch. 70, § 1, p. 236.]

**Compiler's notes.** Section 56 of S.L. 1927, ch. 261 is compiled as § 46-406.

Sections 57-70 of S.L. 1927, ch. 261, formerly compiled as §§ 46-501—46-515, were repealed by S.L. 1975, ch. 147, § 1.

Section 2 of S.L. 1996, ch. 411 declared an

emergency and provided that the act should be in full force and effect on and after its passage and approval, retroactive to January 1, 1996. Approved March 20, 1996.

**Sec. to sec. ref.** This section is referred to in §§ 46-607, 46-609, 72-419.

#### 46-606. Incapacity as result of active duty — Claims. [Repealed.]

**Compiler's notes.** This section which comprised I.C., § 46-606, as added by 1927, ch. 261, § 72, p. 510; I.C.A., § 45-606; am. 1957,

ch. 174, § 63, p. 312, was repealed by S.L. 1999, ch. 118, § 1, effective July 1, 1999.

**46-607. Pay on active duty — State liable for expenses and claims.** — All officers and enlisted personnel of the national guard not in the service of the United States, while on duty or assembled therefor, pursuant to the orders of the governor, or any other civil officer authorized by law to make such demand on the military forces of the state in case of a state of extreme emergency, or threats thereof, or whenever called upon in aid of civil authorities, shall receive the same pay and allowances for such service as that prescribed in section 46-605, Idaho Code; and such compensation and the necessary expenses incurred in quartering, caring for, warning for duty, and transporting and subsisting the military personnel as well as the expense incurred for pay, care and subsistence of officers and enlisted personnel shall be paid by the state. [1927, ch. 261, § 73, p. 510; I.C.A., § 45-607; am. 1957, ch. 174, § 64, p. 312; am. 1999, ch. 118, § 2, p. 352.]

**Compiler's notes.** Section 74 of S.L. 1927, ch. 261 is compiled as § 46-303.

Section 1 of S.L. 1999, ch. 118, contained a repeal and § 3 is compiled as § 72-419.

**Sec. to sec. ref.** This section is referred to in § 46-609.

**Collateral References.** 54 Am. Jur. 2d, Military, and Civil Defense, §§ 164-174.

Enlistment or mustering of minors into military service. 137 A.L.R. 1467; 147 A.L.R. 1311; 151 A.L.R. 1455; 153 A.L.R. 1420; 155 A.L.R. 1451; 157 A.L.R. 1449.

#### 46-608. Pensions for death in active service. [Repealed.]

**Compiler's notes.** This section which comprised S.L. 1927, ch. 261, § 90, p. 510; I.C.A.,

§ 45-608; am. 1957, ch. 174, § 65, p. 312 was repealed by S.L. 1978, ch. 54, § 7.

**46-609. Officers and enlisted personnel on special duty — Compensation and allowances.** — Commissioned officers and enlisted personnel of the national guard may be ordered upon special duty at the direction of the governor as commander-in-chief, with or without their consent, and if with their consent, notwithstanding the provisions of sections 46-605 and 46-607, Idaho Code, such duty may be without any pay or allowances, but if without consent, they shall receive the same pay and allowances as prescribed in section 46-605, Idaho Code, during the time they may continue upon duty under such order. [1927, ch. 261, § 32, p. 510;

I.C.A., § 45-609; am. 1957, ch. 174, § 66, p. 312; am. 1998, ch. 98, § 1, p. 347.]

**Compiler's notes.** Sections 31 and 33 of S.L. 1927, ch. 261 are compiled as §§ 46-212 and 46-213, respectively.

**Collateral References.** 6 C.J.S., Armed Services, §§ 289-294.

**46-610. Military maneuvers and camps — Compensation. —** Camps of instruction, combined camps with the armed forces of the United States and military personnel of other states, practice marches, maneuvers, and other exercises, including outdoor target practice, shall be held at such times and places and for such organizations and for such periods as the governor as commander-in-chief, may direct; no one of which shall exceed fifteen (15) days in one (1) year. During such tour of duty, an inspection shall be made by such officers as may be designated for that purpose by the governor.

For service during such tours of duty, commissioned officers shall be entitled to the same pay and allowances, and to transportation in kind, as officers of like grade and length of service in the armed forces of the United States, are or may hereafter be entitled to by law, while in the performance of field duty; and any such payment not made from federal funds, shall be payable from state funds by the adjutant general in the usual manner. For services during such tours of duty, all enlisted personnel shall be entitled to and shall receive the per diem pay as provided enlisted personnel of like grade in the armed forces of the United States and in addition thereto enlisted personnel shall be entitled to transportation in kind, and to subsistence. Such per diem payment shall be made to enlisted personnel on payrolls from funds of the state, when such payment is not made from funds of the United States. [1927, ch. 261, § 75, p. 510; I.C.A., § 45-610; am. 1957, ch. 174, § 67, p. 312.]

**Compiler's notes.** Sections 74 and 76 of S.L. 1927, ch. 261 are compiled as §§ 46-303 and 46-214, respectively.

## CHAPTER 7

### ARMORIES AND MILITARY PROPERTY

#### SECTION.

- 46-701. Expenses of armories and other facilities for national guard.
- 46-702 — 46-704. [Repealed.]
- 46-705. Leases of military property — Approval.
- 46-706. Title.
- 46-707. Definitions.
- 46-708. Administration.
- 46-709. General powers and duties.
- 46-710. [Repealed.]
- 46-711. Survey and planning activities.
- 46-712. Construction program.
- 46-713. Construction, expansion and rehabilitation of armories — Supervision by adjutant general.

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- 46-714. Approval of board of examiners.
- 46-715. Application for federal funds for survey, planning and construction — Expenditure.
- 46-716. State plan.
- 46-717. Armory use, maintenance and operation.
- 46-718. Priority of projects.
- 46-719. Armory construction fund.
- 46-720. Agreements necessary to comply with United States statutes for construction of armories authorized.
- 46-721. Donations from funds of specified government units authorized



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for construction and maintenance of armories.

46-722. Acquisition of armory sites, agreements for federal assistance, special fund and tax levies authorized.

46-723. Joint ownership of armory.

46-724. Armories constructed with use of federal funds regulated by adju-

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tant general — Armory advisory committee.

46-725. Availability of armory for emergency and disaster relief purposes.

46-726. Reversion of armory to specified government units when not required for national guard.

46-727. Title.

**46-701. Expenses of armories and other facilities for national guard.** — Armories, stables, storehouses, arsenals, depots, and other agencies and facilities for the use of the national guard shall be built by the state, repairs thereto, and the maintenance, and necessary expenses for heating, lighting, and for water, shall be paid by the state, except that the state pay only such part of such expense for water, heat, or light, as was incurred for military purposes: provided further, that no moneys of the state shall be expended for any of the purposes provided in this section unless the funds be from an appropriation made by the legislature for such specific purpose. [1927, ch. 261, § 82, p. 510; I.C.A., § 45-701.]

**Compiler's notes.** Section 81 of S.L. 1927, ch. 261 is compiled as § 46-803.

**Cross ref.** Exemptions of public buildings from execution, § 11-605.

**Collateral References.** Taxation to provide armory as within constitutional prohibition on legislature from taxing for county, city or corporate purposes. 46 A.L.R. 609; 106 A.L.R. 906.

Taxation for purposes of militia as violation of constitutional provision prohibiting legislature from imposing taxes for county, city or corporate purposes, or providing that legislature may invest power to levy such taxes in local authorities. 106 A.L.R. 923.

**46-702. Armory commission — Powers and duties. [Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1927, ch. 261, § 83, p. 510; am. 1931, ch. 186, § 8, p. 310; I.C.A., § 45-

702; am. 1941, ch. 121, § 1, p. 244; am. 1951, ch. 276, § 1, p. 583, was repealed by S.L. 1972, ch. 174, § 1, p. 434.

**46-703. Armory boards — Local board of supervisors. [Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1927, ch. 261, § 84, p. 510;

I.C.A., § 45-703, was repealed by S.L. 1951, ch. 276, § 2, p. 583.

**46-704. Armory board of control — Powers and duties. [Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1927, ch. 261, § 85, p. 510;

I.C.A., § 45-704, was repealed by S.L. 1951, ch. 276, § 3, p. 583.

**46-705. Leases of military property — Approval.** — The adjutant general may execute a lease on any building, ground, or target range owned by the state, for a period of not to exceed five (5) years with renewal privileges thereon, at such rate of compensation as the adjutant general shall deem just and reasonable when said buildings, grounds or target ranges are not required for military purposes: provided, that said lease shall not become effective until the governor shall have approved the same:

provided further, that any lease or license covering any building, grounds, or target range shall be revocable at the pleasure of the governor, and no action shall accrue against or liability be incurred by the state by reason of the revocation of such lease or license. [1927, ch. 261, § 86, p. 510; I.C.A., § 45-705; am. 1951, ch. 276, § 4, p. 583.]

**Compiler's notes.** Section 87 of S.L. 1927, ch. 261 is compiled as § 46-604.

**46-706. Title.** — This act may be cited as the "Armory Construction Act." [1953, ch. 147, § 1, p. 236.]

**Compiler's notes.** The words "this act" refer to S.L. 1953, ch. 147, compiled as §§ 46-706 — 46-719.

**46-707. Definitions.** — As used in this act:

- (a) "Adjutant general" means the adjutant general of the State of Idaho;
- (b) "The Federal Act" means Public Law No. 783 of the 81st Congress, (64 Stat. 829-832), entitled "The National Defense Facilities Act."
- (c) "National Guard Bureau" means the National Guard Bureau of the Department of the Army and National Guard Bureau of the Department of the Air Force.
- (d) "Idaho National Guard" means the Idaho Army National Guard and the Idaho Air National Guard.
- (e) "Armory" means a building, storehouse, repository, arsenal, depot or training facility on land owned, leased, licensed or otherwise under the control of the Idaho National Guard. [1953, ch. 147, § 2, p. 236; am. 1989, ch. 34, § 1, p. 44.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-706.

The National Defense Facilities Act referred to in subdivision (b) of this section is

compiled as 10 U.S.C. § 18231 et seq.

Section 2 of S.L. 1989, ch. 34 declared an emergency. Approved March 20, 1989.

**46-708. Administration.** — The adjutant general is hereby authorized to institute, establish and maintain a program of armory construction. The adjutant general shall constitute the sole agency of the state for the purpose of (1) making an inventory of existing armories, surveying the need for the construction of armories, and developing a program of armory construction as provided in this act, and (2) developing and administering a state plan for the construction of armories as provided in this act. Armory construction shall include construction of new facilities and expansion, rehabilitation or conversion of existing facilities. [1953, ch. 147, § 3, p. 236.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-706.

**46-709. General powers and duties.** — In carrying out the purposes of this act the adjutant general is authorized and directed:



(a) To require such reports, inspections and investigations, and prescribe such regulations as he deems necessary;

(b) To provide such methods of administration, to appoint and hire such personnel and take such other action as may be necessary to comply with the requirements of the federal act and the regulations thereunder; to furnish progress reports, certificates of completion, and other documents, data, and evidence required by the federal act, or regulations thereunder, and perform such other acts as are necessary to acquire and utilize federal funds from the National Guard Bureau or other appropriate federal agencies for the purpose of this act.

(c) To procure in his discretion the temporary and intermittent services of experts or consultants or organizations thereof, by contract, when such services are to be performed on a part time or fee for services basis and do not involve the performance of administrative duties;

(d) To the extent that he considers desirable to effectuate the purposes of this act, to enter into agreements for the utilization of the facilities and services of other departments of the state, other public or private agencies and institutions, and any county, city, town or village.

(e) To accept on behalf of the state and to deliver to the state treasurer for deposit in the armory construction fund any grant, gift or contribution made to assist in meeting the costs of carrying out the purposes of this act as herein provided; to accept on behalf of the state any grant, gift, bequest or other conveyance of real property made to assist in the carrying out of the purposes of this act.

(f) To make an annual report to the legislature on activities and expenditures pursuant to this act, including recommendations for such additional legislation as the adjutant general considers appropriate to furnish adequate armory facilities for the Idaho National Guard. [1953, ch. 147, § 4, p. 236; am. 1976, ch. 9, § 5, p. 25.]

**Compiler's notes.** For words "this act" see compiled as §§ 39-3005 and 56-202, respectively.  
Compiler's note, § 46-706.

Sections 4 and 6 of S.L. 1976, ch. 9, are

#### **46-710. Advisory armory board of trustees. [Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1953, ch. 147, § 5, p. 236, was repealed by S.L. 1972, ch. 174, § 2, p. 434.

**46-711. Survey and planning activities.** — The adjutant general is authorized and directed to make an inventory of existing armories, to survey the need for the construction of armories, and, on the basis of such inventory and survey, to develop a program for the construction of such armories as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate armories for the personnel of the Idaho National Guard. [1953, ch. 147, § 6, p. 236.]

**46-712. Construction program.** — The construction program shall provide, in accordance with the regulations prescribed under the Federal

Act, for adequate armory facilities for the Idaho National Guard and insofar as possible shall provide for their distribution throughout the state in such manner as to best serve the interests of the Idaho National Guard. [1953, ch. 147, § 7, p. 236.]

**46-713. Construction, expansion and rehabilitation of armories — Supervision by adjutant general.** — The adjutant general is authorized and empowered to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, expansion, rehabilitation or conversion of any and all armories as provided in this act, and the powers and duties vested in the adjutant general herein are expressly exempted from the provisions of sections 57-1101 through 57-1107, and section 67-5711, Idaho Code. The adjutant general is also empowered to exercise the authorities set out in section 67-5711B, Idaho Code, with respect to emergencies for armories. [1953, ch. 147, § 8, p. 236; am. 1999, ch. 111, § 1, p. 339.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-706.

**Cross ref.** Permanent building fund,  
§§ 57-1101 — 57-1113.

**46-714. Approval of board of examiners.** — No contract in excess of the threshold amount specified for the requirement for formal bids in section 67-5711, Idaho Code, may be let by the adjutant general until written approval of the same shall be given by the board of examiners. [1953, ch. 147, § 9, p. 236; am. 1999, ch. 109, § 1, p. 337.]

**Cross ref.** State board of examiners,  
§§ 67-2001 — 67-2031.

**46-715. Application for federal funds for survey, planning and construction — Expenditure.** — The adjutant general is authorized to make application to the National Guard Bureau for federal funds to assist in carrying out the survey, planning and construction activities herein provided. If any such federal funds are delivered to the state for disbursement, such funds shall be delivered to the state treasurer and by him deposited in the armory construction fund hereinafter created. Such funds are hereby appropriated to the adjutant general for expenditure for carrying out the survey, planning and construction activities. Any federal funds received and not expended for such purposes shall be refunded to the treasury of the United States. [1953, ch. 147, § 10, p. 236.]

**46-716. State plan.** — The adjutant general shall prepare and submit to the National Guard Bureau a state plan which shall include the armory construction program developed under this act and which shall provide for the establishment, administration and operation of armory construction activities in accordance with the requirements of the Federal Act and the regulations thereunder. The adjutant general shall from time to time review the armory construction program and submit to the National Guard Bureau any modification thereof which he may find necessary and may submit to the National Guard Bureau such modification of the state plan, not



inconsistent with the requirements of the Federal Act, as he may deem advisable. [1953, ch. 147, § 11, p. 236.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-706.

**46-717. Armory use, maintenance and operation.** — All armories constructed with the use of federal funds under the provisions of this act shall be the property of the state of Idaho, and the adjutant general shall by regulation prescribe minimum standards for their maintenance, operation, and use. The adjutant general is authorized to permit use of such armories by public and private persons and organizations under such leases or other agreements as he shall deem appropriate, provided such use does not interfere with their use for the administration and training of the Idaho National Guard or conflict with the provisions of the Federal Act and regulations thereunder; provided, that any armory constructed with the use of Federal funds under the provisions of the Armory and Emergency Relief Facilities Act shall be jointly owned by the state of Idaho and the city or village, city or village and county, and county participating thereunder. [1953, ch. 147, § 12, p. 236; am. 1955, ch. 52, § 2, p. 73.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-706.

The Armory and Emergency Relief Facilities Act referred to in this section is compiled as §§ 46-720 — 46-727.

Section 1 of S.L. 1955, ch. 52, is compiled as §§ 46-720 — 46-727.

Section 3 of S.L. 1955, ch. 52 declared an emergency. Approved February 19, 1955.

**46-718. Priority of projects.** — The state plan shall set forth the relative need for the several projects included in the construction program determined in accordance with regulations prescribed pursuant to the Federal Act and provide for the construction, insofar as financial resources are available therefor and for maintenance and operations make possible, in the order of such relative need. [1953, ch. 147, § 13, p. 236.]

**46-719. Armory construction fund.** — There is hereby created in the state treasury, a separate fund to be known as the "Armory Construction Fund," and all such moneys as may hereafter come into said fund are hereby appropriated for armory construction projects and to carry out the purposes and objects of this act. All funds received from the federal government, if such funds are payable directly to the state, and all other funds received from any source to carry out the purposes and objects of this act, shall be delivered to the state treasurer and by him deposited in said "Armory Construction Fund." All moneys paid into said "Armory Construction Fund," including federal moneys and state moneys appropriated thereto, shall be used solely for the construction of new armory facilities or the expansion, rehabilitation or conversion of existing facilities as provided in this act, and such moneys shall be paid out upon warrants drawn by the state controller upon presentation of proper vouchers showing the adjutant general's approval of such disbursements. Any appropriations made to the "Armory Construction Fund" are expressly exempted from the provisions of the

Standard Appropriations Act of 1945, sections 67-3601—67-3614, Idaho Code, from the provisions of section 67-3509, Idaho Code, and from the provisions of sections 67-3516—67-3523, Idaho Code. [1953, ch. 147, § 14, p. 236; am. 1994, ch. 180, § 87, p. 420.]

**Compiler's notes.** Sections 67-3520, 67-3522 and 67-3523, referred to at the end of this section "the provisions of sections 67-3516 — 67-3523," have been repealed.

Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 87 of S.L. 1994, ch. 180 became effective January 2, 1995.

For words "this act" see Compiler's note, § 46-706.

Sections 86 and 88 of S.L. 1994, ch. 180 are compiled as §§ 42-2807 and 46-1005A, respectively.

Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if

the state board of canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to state controller."

Section 15 of S.L. 1953, ch. 147 read: "If any provision of this act or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of the act are declared to be severable."

Section 16 of S.L. 1953, ch. 147 declared an emergency. Approved March 10, 1953.

**Cross ref.** Appropriation acts deemed fixed budgets, requests for allotments, §§ 67-3516 — 67-3521.

Appropriation, time when available, § 67-3509.

Standard Appropriations Act of 1945, §§ 67-3601 — 67-3614.

**46-720. Agreements necessary to comply with United States statutes for construction of armories authorized.** — It is the sense of the legislature that the defense of the country and the general welfare of its people is the joint responsibility of the government of the United States and the several states thereof including the state of Idaho and its cities, villages and counties. In fulfilling this obligation and to promote volunteer organizations and to afford them effectual encouragement, it is necessary for the state of Idaho to provide the national guard with armories for training personnel and housing equipment. The state of Idaho desires to avail itself of the provisions of existing federal statutes, and any statutes that may be enacted hereafter relating to the construction of armories and to provide, in addition to military use, that such armories shall be available for use in event of emergencies or disasters and for community use. To permit cities and villages, cities or villages and counties, and counties to participate with the state of Idaho in the acquisition of armories and sites for armories, and to accomplish the purposes of this act, it is hereby found and declared necessary to authorize cities and villages, cities or villages and counties, and counties to levy taxes, to donate funds and property to the state of Idaho, and to enter into such agreements as may be necessary for the purpose of complying with the statutes of the United States relating to the construction of armories. [1953, ch. 147, § 17, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** Section 2 of S.L. 1955, ch. 52, is compiled as § 46-717.



**46-721. Donations from funds of specified government units authorized for construction and maintenance of armories.** — Any city or village, city or village and county, and county may acquire, provide, and donate to the state of Idaho funds from its general fund and from its special fund created and established in section 46-722(c), and property, for the construction, maintenance, repair, alteration, and rehabilitation of armories and armory sites as prescribed by the Armory Construction Act (chapter 147 of the Session Laws of 1953). [1953, ch. 147, § 18, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** The Armory Construction Act referred to in this section is compiled as §§ 46-706 — 46-719.

The words enclosed in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1955, ch. 52, is compiled herein as § 46-717.

**46-722. Acquisition of armory sites, agreements for federal assistance, special fund and tax levies authorized.** — To accomplish the purpose set forth in this act, the governing body of any city or village, or city or village and county, and the board of county commissioners may:

(a) Purchase, receive by donation, or otherwise acquire, real property for armory sites, and armories, and convey and transfer such sites and armories to the state of Idaho in joint ownership; purchase, receive by donation, lease or otherwise acquire, personal property for use in armories and to transfer the same to the state of Idaho in joint ownership.

(b) Enter into agreements on behalf of the city or village, city or village and county, and county with the adjutant general of the state of Idaho, the Department of Defense and the Departments of Army and Air Force, for the purpose of securing federal funds for the construction, maintenance, repair, alteration and rehabilitation of armories.

(c) Establish a special fund for the purposes of this act, levy a special tax for such purposes, but no levy for the purposes of this act shall exceed two hundredths percent (.02%) of the market value for assessment purposes on all taxable property in such city or village, or city or village and county, and county. [1953, ch. 147, § 19, as added by 1955, ch. 52, § 1, p. 73; am. 1995, ch. 82, § 20, p. 218.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-727.

Section 2 of S.L. 1955, ch. 52, is compiled as § 46-717.

Sections 19 and 21 of S.L. 1995, ch. 82 are compiled as §§ 42-3708 and 50-235, respectively.

**46-723. Joint ownership of armory.** — Any armory constructed under this act wherein funds have been provided by a city or village, city or village and county, and county shall be jointly owned by the state and the participating city or village, city or village and county, and county; provided the participating city or village, city or village and county, and county contributes ten per cent (10%) or more of the actual construction cost, exclusive of the cost or market value of any real estate concerned. [1953, ch. 147, § 20, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-727.

Section 2 of S.L. 1955, ch. 52, is compiled as  
§ 46-717.

**46-724. Armories constructed with use of federal funds regulated by adjutant general — Armory advisory committee.** — All armories constructed with the use of federal funds under the provisions of this act shall be under the control of the adjutant general who shall by regulation prescribe minimum standards for their maintenance, operation and use. The adjutant general is authorized to permit the use of such armories by public and private persons and organizations under such leases or other agreements as he shall deem appropriate, provided such use does not interfere with their use for the administration and training of the Idaho National Guard, or conflict with the provisions of the National Defense Facilities Act of 1950 and the regulations thereunder. To assist the adjutant general to accomplish these purposes, the adjutant general may appoint an Armory Advisory Committee, consisting of one (1) representative each from the participating city or village, or city or village and county, and county, one (1) representative from the office of the adjutant general, and one (1) representative from the national guard unit, or units, occupying the armory. The Armory Advisory Committee shall advise and consult with the adjutant general in the use of said armory and shall assist him in the promulgation and adoption of rules and regulations governing the use of said armory by public and private persons and organizations. [1953, ch. 147, § 21, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-727.

Section 2 of S.L. 1955, ch. 52, is compiled as  
§ 46-717.

The National Defense Facilities Act of 1950  
referred to in this section is compiled in 50  
U.S.C. §§ 881-887.

**46-725. Availability of armory for emergency and disaster relief purposes.** — When the governor shall declare an emergency within any county which has an armory constructed under the provisions of this act, the governor may declare, subject to the provisions of the National Defense Facilities Act of 1950, that such armory be made available immediately to the board of county commissioners of such county for emergency and disaster relief purposes. [1953, ch. 147, § 22, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-727.

U.S.C. § 18231 et seq.

The National Defense Facilities Act of 1950  
referred to in this section is compiled as 10

Section 2 of S.L. 1955, ch. 52, is compiled as  
§ 46-717.

**46-726. Reversion of armory to specified government units when not required for national guard.** — Any jointly owned armory constructed under the provisions of this act and not required for the administration and training of the national guard shall revert to the control of the participating city or village, city or village and county, and county, subject to



the provisions of the National Defense Facilities Act of 1950. [1953, ch. 147, § 23, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-727.

The National Defense Facilities Act of 1950 referred to in this section is compiled in 50 U.S.C. §§ 881-887.

Section 2 of S.L. 1955, ch. 52, is compiled as § 46-717.

**46-727. Title.** — This act shall be known as the "Armory and Emergency Relief Facilities Act." [1953, ch. 147, § 24, as added by 1955, ch. 52, § 1, p. 73.]

**Compiler's notes.** The words "this act" refer to §§ 17 through 24 of S.L. 1953, ch. 147, as added by § 1 of S.L. 1955, ch. 52, which is compiled as §§ 46-720 — 46-727.

Section 2 of S.L. 1955, ch. 52, is compiled as § 46-717.

Section 25 of S.L. 1953, ch. 147, as added by 1955, ch. 52, § 1 read: "If any provisions of this act or the application thereof to any

person or circumstance shall be held invalid, such invalidity shall not affect the provisions of applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of the act are declared to be severable."

Section 3 of S.L. 1955, ch. 52 declared an emergency. Approved February 19, 1955.

## CHAPTER 8

### MISCELLANEOUS AND GENERAL PROVISIONS

#### SECTION.

46-801. State flag.

46-802. Unorganized associations prohibited — Parades prohibited — Exceptions.

46-803. Jurisdiction of courts and boards presumed.

#### SECTION.

46-804. [Repealed.]

46-805. [Repealed.]

46-806, 46-807. [Repealed.]

**46-801. State flag.** — A state flag for the state of Idaho is hereby adopted, the same to be as follows:

A silk flag, blue field, five (5) feet six (6) inches fly, and four (4) feet four (4) inches on pike, bordered with gilt fringe two and one half (2½) inches in width, with state seal of Idaho twenty-one (21) inches in diameter, in colors, in the center of a blue field. The words "State of Idaho" are embroidered in with block letters, two (2) inches in height on a red band three (3) inches in width by twenty-nine (29) inches in length, the band being in gold and placed about eight and one half (8½) inches from the lower border of fringe and parallel with the same. [1927, ch. 261, § 12, p. 510; I.C.A., § 45-801.]

**Compiler's notes.** Sections 11 and 13 of S. L. 1927, ch. 261 are compiled as §§ 46-108 and 46-109, respectively.

**Cross ref.** Military organizations not to

carry other than national and state flags, Const., Art. 14, § 5.

**Collateral References.** 36A C.J.S., Flags, § 1.

**46-802. Unorganized associations prohibited — Parades prohibited — Exceptions.** — No body of men, other than the regularly organized national guard, the unorganized militia when called into service of the state, or of the United States, and except such as are regularly recognized and

provided for by the laws of the state of Idaho and of the United States, shall associate themselves together as a military company or organization, or parade in public with firearms in any city or town of this state.

No city or town shall raise or appropriate any money toward arming or equipping, uniforming, or in any other way supporting, sustaining or providing drill rooms or armories for any such body of men; but associations wholly composed of soldiers honorably discharged from the service of the United States or members of the orders of Sons of Veterans, or of the Boy Scouts, may parade in public with firearms on Memorial Day or upon the reception of any regiment or companies of soldiers returning from such service, and for the purpose of escort duty at the burial of deceased soldiers; and students in educational institutions where military science is taught as a prescribed part of the course of instruction, may with the consent of the governor, drill and parade with firearms in public, under the superintendence of their teachers. This section shall not be construed to prevent any other organization authorized by law parading with firearms, nor to prevent parades by the national guard of any other state or territory. [1927, ch. 261, § 79, p. 510; 1931, ch. 186, § 7, p. 310; I.C.A., § 45-802; am. 2002, ch. 146, § 1, p. 419.]

**Compiler's notes.** Section 78 of S.L. 1927, ch. 261 is compiled as § 46-215.

Section 80 of S.L. 1927, ch. 261, formerly compiled as § 46-515, was repealed by S.L. 1975, ch. 147, § 1.

Section 4 of S.L. 1931, ch. 186 is compiled as § 46-205, §§ 5 and 6 were repealed by S.L. 1975, ch. 147, § 1, and § 8 was repealed by S.L. 1972, ch. 174, § 1.

Section 2 of S.L. 2002, ch. 146, is compiled as § 67-5302.

**Cross ref.** Cooperation of militia with civil authorities, § 46-604.

**Sec. to sec. ref.** This section is referred to in § 46-304.

**Collateral References.** Validity, construction, and application of state or local enactments regulating parades. 80 A.L.R.5th 255.

**46-803. Jurisdiction of courts and boards presumed.** — The jurisdiction of the courts and board established by this act shall be presumed and the burden of proof shall rest on any person seeking to oust such courts or boards of jurisdiction in any case or proceeding. [1927, ch. 261, § 81, p. 510; I.C.A., § 45-803.]

**Compiler's notes.** The words "this act" refer to S.L. 1927, ch. 261 compiled as chs. 1-4 and 6-8 of this title.

Sections 46-501 — 46-515, providing for courts-martial, were repealed by S.L. 1975, ch. 147, § 1. For present law on the jurisdiction of courts-martial see §§ 46-1111 and 46-1112.

Sections 46-703 and 46-704, providing for armory boards of control, were repealed by S.L. 1972, ch. 174, §§ 2 and 3, respectively.

Section 82 of S.L. 1927, ch. 261 is compiled as § 46-701.

#### **46-804. Cost of bonds — How paid. [Repealed.]**

**Compiler's notes.** This section which comprised S.L. 1927, ch. 261, § 88, p. 510; I.C.A., § 45-804; am. 1939, ch. 50, § 5, p. 91; am.

1950 (E.S.), ch. 24, § 7, p. 35 was repealed by S.L. 1978, ch. 54, § 7.



**46-805. Attorney general as legal advisory of adjutant general. [Repealed.]**

**Compiler's notes.** This section which comprised S.L. 1927, ch. 261, § 89, p. 510; I.C.A., § 45-805; am. 1972, ch. 174, § 3, p. 434, was repealed by S.L. 1975, ch. 147, § 3, p. 339.

**46-806, 46-807. Adjutant general's contingent fund — Appropriation — Allowance and payment of claims. [Repealed.]**

**Compiler's notes.** These sections, which comprised S.L. 1927, ch. 261, §§ 91, 92, p. 510; I.C.A., §§ 45-806, 45-807, were repealed by S.L. 1950 (E.S.), ch. 24, § 8, p. 39.

## CHAPTER 9

### IDAHO NATIONAL GUARD TRUST FUND

#### SECTION.

46-901 — 46-903. [Repealed.]

**46-901 — 46-903. National guard trust fund. [Repealed.]**

**Compiler's notes.** These sections which comprised S.L. 1927, ch. 76, §§ 1-3, p. 95; I.C.A., §§ 46-901 — 46-903 were repealed by S. L. 1972, ch. 174, § 4, p. 434 and S.L. 1975, ch. 147, § 2, p. 339.

## CHAPTER 10

### STATE DISASTER PREPAREDNESS ACT

#### SECTION.

46-1001. Short title.  
46-1002. Definitions.  
46-1003. Policy and purposes.  
46-1004. Bureau of disaster services created.  
46-1005. Chief of bureau — Appointment — Compensation.  
46-1005A. Disaster emergency account.  
46-1006. Powers and duties of chief and bureau.  
46-1007. Limitations.  
46-1008. The governor and disaster emergencies.  
46-1009. Local and intergovernmental disaster agencies and services.  
46-1010. Intergovernmental arrangements.  
46-1011. Local disaster emergencies.  
46-1012. Compensation.  
46-1013. Communications.

#### SECTION.

46-1014. Mutual aid.  
46-1015. Weather modification.  
46-1016. Liability for property damage, bodily injury or death.  
46-1017. Immunity.  
46-1018. Interstate mutual aid compact.  
46-1018A. Emergency management assistance compact.  
46-1019. Emergency response.  
46-1020. Purpose and findings.  
46-1021. Definitions.  
46-1022. Local governments may adopt floodplain zoning ordinances.  
46-1023. Enforcement and sanctions.  
46-1024. Severability.  
46-1025. Federal funds to political subdivisions.

**46-1001. Short title. —** This act shall be cited as the "Idaho Disaster Preparedness Act of 1975." [I.C., § 46-1001 as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** Former §§ 46-1001 — 46-1012, comprising S.L. 1955, ch. 269, §§ 1-8, p. 653; I.C., §§ 46-1010 — 46-1012 as added by 1963, ch. 302, §§ 1-3, p. 791; am. 1971, ch. 155, §§ 1-3, p. 758; am. 1974, ch. 22,

§§ 12-16, p. 592 were repealed by S.L. 1975, ch. 212, § 1, p. 854 and the present material on the same subject substituted therefor.

The words "this act" refer to S.L. 1975, ch. 212 compiled as §§ 46-1001 — 46-1017.

**Cross ref.** Workers' Compensation Law, application to regularly enrolled volunteer firefighters and civil defense workers, § 72-205.

**Sec. to sec. ref.** This chapter is referred to in §§ 39-7107 and 54-1903.

**Cited in:** Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987).

**46-1002. Definitions.** — As used in this act:

(1) "Bureau" means the bureau of disaster services, military division of the office of the governor.

(2) "Adjutant general" means the administrative head of the military division of the office of the governor.

(3) "Disaster" means occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause, including but not limited to fire, flood, earthquake, windstorm, wave action, volcanic activity, explosion, riot, or hostile military or paramilitary action.

(4) "Emergency" means occurrence or imminent threat of a disaster or condition threatening life or property which requires state emergency assistance to supplement local efforts to save lives and protect property or to avert or lessen the threat of a disaster.

(5) "Political subdivision" means any county, city, or other unit of local government.

(6) "Militia" means all able-bodied male citizens of Idaho as defined in section 46-102, Idaho Code.

(7) "Search and rescue" means the employment, coordination, and utilization of available resources and personnel in locating, relieving distress and preserving life of, and removing survivors from the site of a disaster, emergency or hazard to a place of safety in case of lost, stranded, entrapped, or injured persons.

(8) "Disaster emergency account" means the account created under this act for the purpose of paying obligations and expenses incurred by the state of Idaho during a declared state of disaster emergency.

(9) "Commission" means the Idaho emergency response commission.

(10) "Bureau of hazardous materials" means the bureau of hazardous materials in the military division of the office of the governor. [I.C., § 46-1002, as added by 1975, ch. 212, § 2, p. 584; am. 1981, ch. 320, § 1, p. 666; am. 1997, ch. 121, § 10, p. 357.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-1001.

Sections 9 and 11 of S.L. 1997, ch 121 are compiled as §§ 39-7114 and 46-1019, respectively.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 447-453.

**46-1003. Policy and purposes.** — It is the policy of this state to plan and prepare for disasters and emergencies resulting from natural or man made causes, enemy attack, sabotage or other hostile action, and to implement this policy, it is found necessary:

(1) To create a bureau of disaster services, to authorize the creation of local organizations for disaster preparedness in the political subdivisions of the state, and to authorize the state and political subdivisions to execute



agreements and to cooperate with the federal government and the governments of other states.

(2) To prevent and reduce damage, injury, and loss of life and property resulting from natural or man made catastrophies, riots, or hostile military or paramilitary action.

(3) To prepare assistance for prompt and efficient search, rescue, care, and treatment of persons injured, victimized or threatened by disaster.

(4) To provide for rapid and orderly restoration and rehabilitation of persons and property affected by disasters.

(5) To prescribe the roles of the governor, state agencies, and local governments in prevention of, preparation for, response to and recovery from disasters.

(6) To authorize and encourage cooperation in disaster prevention, preparedness, response and recovery.

(7) To provide for coordination of activities relating to disaster prevention, preparedness, response, and recovery by all state agencies, political subdivisions, and interstate, federal-state and Canadian activities in which the state and its political subdivisions may participate.

(8) To provide a disaster management system embodying all aspects of predisaster preparedness and postdisaster response.

(9) To provide for the payment of obligations and expenses incurred by the state of Idaho through the bureau of disaster services during a declared state of disaster emergency. [I.C., § 46-1003, as added by 1975, ch. 212, § 2, p. 584; am. 1981, ch. 320, § 2, p. 666.]

**Compiler's notes.** Section 3 of S.L. 1981, ch. 320 is compiled as § 46-1005A.

**Opinions of Attorney General.** The responsibilities and authorities of the county commissioners to the citizens of an incorporated municipality in times of a disaster emergency are defined in the intergovernmental disaster emergency plan, if any, agreed to by the city. Const., Art. 12, § 2, prohibits the county from unilaterally imposing its plan on an incorporated city. OAG 89-9.

Although § 46-1009 requires the counties to prepare a disaster emergency plan, there is no comparable statute explicitly requiring the cities to participate. Thus, unlike counties, cities are not required to plan for disaster

emergencies. Once a disaster emergency occurs within the city's limits, however, the city government has the responsibility to handle the situation. OAG 89-9.

Plans voluntarily entered into among the various political subdivisions are valid under the Idaho Disaster Preparedness Act of 1975. Because the cities voluntarily ratify the disaster emergency plans, Const., Art. 12, § 2 is not violated. OAG 89-9.

**Collateral References.** Governmental powers in peace-time emergency. 86 A.L.R. 1539; 88 A.L.R. 1519; 96 A.L.R. 312; 96 A.L.R. 826.

Conclusiveness of declaration of emergency in ordinance. 35 A.L.R.2d 586.

**46-1004. Bureau of disaster services created.** — Within the military division of the office of governor, a bureau of disaster services is established. [I.C., § 46-1004 as added by 1975, ch. 212, § 2, p. 584.]

**46-1005. Chief of bureau — Appointment — Compensation.** — The bureau may be headed by a chief appointed by the adjutant general with the concurrence of the governor or the governor may appoint the adjutant general to serve as chief. The chief shall hold office at the pleasure of the governor and his compensation shall be fixed by the governor. If the adjutant general is chief, he shall receive no additional compensation for serving as chief. [I.C., § 46-1005, as added by 1975, ch. 212, § 2, p. 584.]

**46-1005A. Disaster emergency account.** — (1) There is hereby created and established in the state treasury a separate account to be known as the disaster emergency account which account shall be administered by the governor or his designee. The account shall only be used to pay obligations and expenses incurred by the state of Idaho during a declared state of disaster emergency.

(2) In order to pay said obligations and expenses in coping with a declared state of disaster emergency the governor shall expend state money as follows:

(a) The governor shall use any moneys available in the disaster emergency account.

(b) In the event the disaster emergency account is inadequate to satisfy said obligations and expenses, the governor is empowered to direct, by executive order, the state controller to transfer moneys from the general account, created pursuant to section 67-1205, Idaho Code, to the disaster emergency account, provided that in the governor's judgment sufficient general account moneys will be available to support the full general account appropriations for the current fiscal year.

(c) In addition to any purpose for which they have previously been created, all funds excluding constitutionally created funds, or funds limited in their application by the constitution of the state of Idaho, are hereby expressly declared to be appropriated for the purpose of effectuating the purposes of this act. If the moneys made available in paragraphs (a) and (b) above are inadequate to meet the above mentioned obligations and expenses, the governor is empowered to direct the state controller, by executive order, to transfer to the disaster emergency account moneys from any eligible account in order to pay said obligations and expenses; provided, that in the governor's judgment, the moneys transferred are not required to support the current year's appropriation of the affected accounts.

(d) In the event that restitution is made to the state from nonstate sources to reimburse the state for costs incurred in responding to a state of disaster emergency, the governor may use funds from the restitution to reimburse accounts from which funds were drawn to pay for the state's response to the emergency.

(3) In addition to any other purpose for which they might have been appropriated, all moneys made available by this act to be used in the event of a disaster emergency are hereby perpetually appropriated for the purpose set forth in this section according to the limitations established by this section and the constitution of the state of Idaho. In no event may the revenues made available by section 46-1005A (2) (b) and (c), Idaho Code, for any and all emergency purposes exceed, during any fiscal year, one percent (1%) of the annual appropriation of general account moneys for that fiscal year. [I.C., § 46-1005A, as added by 1981, ch. 320, § 3, p. 666; am. 1988, ch. 279, § 1, p. 910; am. 1994, ch. 180, § 88, p. 420.]

**Compiler's notes.** Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday

in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to



state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 88 of S.L. 1994, ch. 180 became effective January 2, 1995.

The words "this act" refer to S.L. 1981, ch. 320, which is compiled as §§ 46-1002, 46-

1003, 46-1005A and 46-1008.

Sections 2 and 4 of S.L. 1981, ch. 320 are compiled as §§ 46-1003 and 46-1008, respectively.

Sections 87 and 89 of S.L. 1994, ch. 180 are compiled as §§ 46-719 and 49-450A, respectively.

**46-1006. Powers and duties of chief and bureau.** — (1) In all matters of disaster services, the adjutant general shall represent the governor and shall on behalf of the governor, coordinate the activities of all of the state agencies in disaster services. The bureau shall have a coordinating officer and other professional, technical, secretarial and clerical employees necessary for the performance of its functions.

(2) The bureau shall prepare, maintain and update a state disaster plan based on the principle of self help at each level of government. The plan may provide for:

- (a) prevention and minimization of injury and damage caused by disaster;
- (b) prompt and effective response to disaster;
- (c) emergency relief;
- (d) identification of areas particularly vulnerable to disasters;
- (e) assistance to local officials in designing local emergency action plans;
- (f) authorization and procedures for the erection or other construction of temporary works designed to protect against or mitigate danger, damage, or loss from disaster;
- (g) preparation and distribution to the appropriate state and local officials of catalogs of federal, state and private assistance programs;
- (h) assistance to local officials in designing plans for search, rescue, and recovery of persons lost, entrapped, victimized, or threatened by disaster;
- (i) organization of manpower and chains of command;
- (j) coordination of federal, state, and local disaster activities;
- (k) coordination of the state disaster plan with the disaster plans of the federal government.

(3) The bureau shall participate in the development and revision of local and intergovernmental disaster plans. To this end it may employ or otherwise secure the services of professional and technical personnel to provide expert assistance to political subdivisions, their disaster agencies, and intergovernmental planning and disaster agencies. This personnel shall consult with subdivisions and agencies and shall make field examinations of the areas, circumstances, and conditions to which particular local and intergovernmental disaster plans are intended to apply.

(4) In preparing and maintaining the state disaster plan, the bureau shall seek the advice and assistance of local government, business, labor, industry, agriculture, civic, and volunteer organizations and community leaders. In advising local and intergovernmental agencies, the bureau shall encourage them also to seek advice from these sources.

(5) The state disaster plan or any part thereof may be incorporated in regulations of the bureau promulgated subject to chapter 52, title 67, Idaho Code.

(6) The bureau shall:

- (a) promulgate standards and criteria for local and intergovernmental disaster plans;
- (b) periodically review local and intergovernmental disaster plans;
- (c) assist political subdivisions, their disaster agencies, and intergovernmental disaster agencies to establish and operate training programs and programs of public information;
- (d) plan and make arrangements for the availability and use of any private facilities, services, and property and, if necessary and if in fact used, provide for payment for use under terms and conditions agreed upon;
- (e) prepare executive orders and proclamations for issuance by the governor, as necessary or appropriate in coping with disasters;
- (f) cooperate with the federal government and any public or private agency or entity in achieving any purpose of this act and in implementing programs for disaster prevention, preparation, response, and recovery;
- (g) maintain a register of search and rescue organizations, units, teams, or individuals operating within the state;
- (h) assist search and rescue units to accomplish standards for equipment, training and proficiency; and
- (i) in addition to disaster prevention measures as included in the state, local, and intergovernmental disaster plans, the bureau shall consider on a continuing basis steps that could be taken to prevent or reduce the harmful consequences of disasters. The governor from time to time may make recommendations to the legislature, local governments and other appropriate public and private entities as may facilitate measures for prevention or reduction of the harmful consequences of disasters;
- (j) not limit the powers and duties of the department of transportation, division of aeronautics, as provided by sections 21-114 and 21-118, Idaho Code. [I.C., § 46-1006, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if the state board of canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to controller."

For words "this act" see Compiler's note, § 46-1001.

**Sec. to sec. ref.** This section is referred to in § 39-7104.

**Opinions of Attorney General.** The legislative mandate of the bureau of disaster services is to oversee and coordinate, not to impose its plans on a city. The responsibility for planning for disaster emergencies within the municipal boundaries lies with the city. OAG 89-9.

**46-1007. Limitations.** — Nothing in this act shall be construed to:

- (1) Interfere with the course or conduct of a labor dispute, except that actions otherwise authorized by this act or other laws may be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety;
- (2) Interfere with dissemination of news or comment on public affairs;
- (3) Affect the jurisdiction or responsibilities of police forces, fire fighting forces, units of the armed forces of the United States, or of any personnel



thereof, when on active duty; but state, local, and intergovernmental disaster emergency plans shall place reliance upon the forces available for performance of functions related to disaster emergencies; or

(4) Limit, modify, or abridge the authority of the governor to proclaim martial law or exercise any other powers vested in him under the constitution or statutes of this state independent of or in conjunction with any provisions of this act. [I.C., § 46-1007, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-1001.

**Cross ref.** Proclamation of martial law,  
§ 46-602.

**46-1008. The governor and disaster emergencies.** — (1) Under this act, the governor may issue executive orders, proclamations and amend or rescind them. Executive orders and proclamations have the force and effect of law.

(2) A disaster emergency shall be declared by executive order or proclamation of the governor if he finds a disaster has occurred or that the occurrence or the threat thereof is imminent. The state of disaster emergency shall continue until the governor finds that the threat or danger has passed, or the disaster has been dealt with to the extent that emergency conditions no longer exist, and when either or both of these events occur, the governor shall terminate the state of disaster emergency by executive order or proclamation; provided, however, that no state of disaster emergency may continue for longer than thirty (30) days unless the governor finds that it should be continued for another thirty (30) days or any part thereof. The legislature by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened, the area subject to the proclamation, and the conditions which are causing the disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and unless the circumstances attendant upon the disaster prevent or impede, be promptly filed with the bureau of disaster services, the office of the secretary of state and the office of the recorder of each county where the state of disaster emergency applies.

(3) An executive order or proclamation of a state of disaster emergency shall activate the disaster response and recovery aspects of the state, local and intergovernmental disaster emergency plans applicable to the political subdivision or area in question and be authority for the deployment and use of any forces to which the plan or plans apply and for use or distribution of any supplies, equipment, and materials and facilities assembled, stockpiled, or arranged to be made available pursuant to this act or any other provision of law relating to disaster emergencies.

(4) During the continuance of any state of disaster emergency the governor is commander-in-chief of the militia and may assume command of all other forces available for emergency duty. To the greatest extent

practicable, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or regulations, but nothing herein restricts his authority to do so by orders issued at the time of the disaster emergency.

(5) In addition to any other powers conferred upon the governor by law, he may:

- (a) suspend the provisions of any regulations prescribing the procedures for conduct of public business that would in any way prevent, hinder, or delay necessary action in coping with the emergency;
- (b) utilize all resources of the state, including, but not limited to, those sums in the disaster emergency account as he shall deem necessary to pay obligations and expenses incurred during a declared state of disaster emergency;
- (c) transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;
- (d) subject to any applicable requirements for compensation under section 46-1012, Idaho Code, commandeer or utilize any private property, real or personal, if he finds this necessary to cope with the disaster emergency;
- (e) direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if he deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;
- (f) prescribe routes, modes of transportation, and destinations in connection with evacuation;
- (g) control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein;
- (h) suspend or limit the sale, dispensing or transportation of alcoholic beverages, firearms, explosives, and combustibles;
- (i) make provision for the availability and use of temporary emergency housing.

(6) Whenever an emergency or a disaster has been declared to exist in Idaho by the president under the provisions of the disaster relief act of 1974 (public law 93-288, 42 USC 5121) the governor may:

- (a) enter into agreements with the federal government for the sharing of disaster recovery expenses involving public facilities;
- (b) require as a condition of state assistance that a local taxing district be responsible for paying forty per cent (40%) of the nonfederal share of costs incurred by the local taxing district which have been determined to be eligible for reimbursement by the federal government, provided that the total local share of eligible costs for a taxing district shall not exceed ten per cent (10%) of the taxing district's tax charges authorized by section 63-802, Idaho Code;
- (c) obligate the state to pay the balance of the nonfederal share of eligible costs within local taxing entities qualifying for federal assistance; and
- (d) enter into agreements with the federal government for the sharing of disaster assistance expenses to include individual and family grant



programs (42 USC 5178). [I.C., § 46-1008, as added by 1975, ch. 212, § 2, p. 584; am. 1981, ch. 89, § 1, p. 123; am. 1981, ch. 320, § 4, p. 666; am. 1984, ch. 4, § 1, p. 7; am. 1996, ch. 208, § 11, p. ; am. 1996, ch. 322, § 45, p. 1029; am. 1997, ch. 117, § 7, p. 298.]

**Compiler's notes.** The words and figures in parentheses so appeared in the law as enacted.

For words "this act" see Compiler's note, § 46-1001.

Section 3 of S.L. 1981, ch. 320 is compiled as § 46-1005A.

Sections 10 and 12 of S.L. 1996, ch. 208 are compiled as §§ 33-2112 and 50-1512, respectively.

Sections 44 and 46 of S.L. 1996, ch. 322 are compiled as §§ 44-2206 (now repealed) and 49-222, respectively.

Sections 6 and 8 of S.L. 1997, ch. 117 are compiled as §§ 33-2710 and 50-2908, respectively.

Section 2 of S.L. 1981, ch. 89 declared an

emergency. Approved March 23, 1981.

Section 5 of S.L. 1981, ch. 320 declared an emergency. Approved April 7, 1981.

Section 2 of S.L. 1984, ch. 4 declared an emergency. Approved February 21, 1984.

Section 22 of S.L. 1996, ch. 208 declared an emergency and provided that this section should be in effect July 1, 1996. Approved March 12, 1996.

Section 42 of S.L. 1997, ch. 117 declared an emergency and provided that §§ 1-40 should be in full force and effect retroactive to January 1, 1997. Approved March 15, 1997.

**Cross ref.** Authority of governor during state of extreme emergency, § 46-601.

**Cited in:** *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

**46-1009. Local and intergovernmental disaster agencies and services.** — (1) Each county within this state shall be within the jurisdiction of and served by the bureau and by a county or intergovernmental agency responsible for disaster preparedness and coordination of response.

(2) Each county shall maintain a disaster agency or participate in an intergovernmental disaster agency which, except as otherwise provided under this act, has jurisdiction over and serves the entire county, or shall have a liaison officer appointed by the county commissioners designated to facilitate the cooperation and protection of that subdivision in the work of disaster prevention, preparedness, response and recovery.

(3) The chairman of the board of county commissioners of each county in the state shall notify the bureau of the manner in which the county is providing or securing disaster planning and emergency services. The chairman shall identify the person who heads the agency or acts in the capacity of liaison from which the service is obtained, and furnish additional information relating thereto as the bureau requires.

(4) Each county and/or intergovernmental agency shall prepare and keep current a local or intergovernmental disaster emergency plan for its area.

(5) The county or intergovernmental disaster agency, as the case may be, shall prepare and distribute to all appropriate officials in written form a clear and complete statement of the emergency responsibilities of all local agencies and officials and of the disaster chain of command.

(6) Except as provided in subsections (7), (8) and (9) of this section, the sheriff of each county shall:

(a) be the official responsible for command of all search and rescue operations within his jurisdiction;

(b) prepare and keep current a plan to command the search and rescue capability and resources available within the county.

(7) Pursuant to chapter 1, title 21, Idaho Code, subsection (6) of this section shall not apply to all aerial activity related to the search for lost

aircraft and airmen which shall be under the direction and supervision of the director of the Idaho transportation department and coordinated with the division of aeronautics.

(8) Nothing in subsection (6) of this section shall apply to search and rescue operations within the incorporated limits of any city.

(9) Nothing in subsection (6) of this section shall apply to the rescue of entrapped or injured persons where their location is known to be within a fire district, where the fire district performs such service. [I.C., § 46-1009, as added by 1975, ch. 212, § 2, p. 584; am. 2003, ch. 132, § 1, p. 385.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-1001.

Section 2 of S.L. 2003, ch. 132 declared an emergency. Approved March 27, 2003.

**Sec. to sec. ref.** This section is referred to in § 46-1025.

**Opinions of Attorney General.** The responsibilities and authorities of the county commissioners to the citizens of an incorporated municipality in times of a disaster emergency are defined in the intergovernmental disaster emergency plan, if any, agreed to by the city. Const., Art. 12, § 2, prohibits the county from unilaterally imposing its plan on an incorporated city. OAG 89-9.

Although this section requires the counties to prepare a disaster emergency plan, there is no comparable statute explicitly requiring the cities to participate. Thus, unlike counties, cities are not required to plan for disaster

emergencies. Once a disaster emergency occurs within the city's limits, however, the city government has the responsibility to handle the situation. OAG 89-9.

Const., Art. 12, § 2, prohibits the sheriff or any other county official from interfering with a municipality. Therefore, the county commissioners and sheriff may not constitutionally take over the duties of the municipality in the event of a disaster emergency. OAG 89-9.

The Idaho Disaster Preparedness Act of 1975 only "encourages" the cities to plan for disaster emergencies; the legislature does not require the cities to plan. OAG 89-9.

The cities have the ultimate authority to plan for disaster emergencies. Although not statutorily required to plan for disaster emergencies, cities are strongly urged to do so in order to minimize the risk of injury to their citizens. OAG 89-9.

**46-1010. Intergovernmental arrangements.** — (1) The governor may enter into interstate emergency or disaster service compacts with any state if he finds that joint action with the state is desirable in meeting common intergovernmental problems of emergency or disaster planning, prevention, response, and recovery.

(2) Nothing in subsection (1) hereof shall be construed to limit previous or future entry into the interstate civil defense and disaster compact of this state with other states.

(3) If any person holds a license, certificate, or other permit issued by any state or political subdivision thereof evidencing the meeting of qualifications for professional, mechanical, or other skills, the person may render aid involving that skill in this state to meet an emergency or disaster proclaimed by the governor, and this state shall give due recognition to the license, certificate, or other permit.

(4) All interstate mutual aid compacts and other interstate agreements dealing with disaster and emergency services shall be reviewed and updated at intervals not to exceed four (4) years.

(5) When considered of mutual benefit, the governor may, subject to limitations of law, enter into intergovernmental arrangements with neighboring provinces of Canada for the purpose of exchanging disaster and emergency services.



(6) Pursuant to an interstate agreement, personnel working for the state, its political subdivisions, municipal or public corporations, and other public agencies, may work outside the state to aid in disaster and emergency relief work; or equipment belonging to the state, its political subdivisions, municipal or public corporations, and other public agencies may be used outside the state to aid in disaster and emergency relief work. When state or local highway equipment or personnel are used in disaster relief work outside the state, arrangements shall be made, as necessary, to reimburse the state, its political subdivisions, municipal or public corporations, and other public agencies, for such work or equipment to comply with section 17, article 7 of the Idaho constitution, which provides that gasoline taxes and motor vehicle funds shall be used exclusively for the public highways of the state. [I.C., § 46-1010, as added by 1975, ch. 212, § 2, p. 584; am. 1986, ch. 107, § 1, p. 294.]

**Compiler's notes.** Section 2 of S.L. 1986, ch. 107 is compiled as § 46-1018.

**Opinions of Attorney General.** The Idaho Disaster Preparedness Act of 1975 only "encourages" the cities to plan for disaster emergencies; the legislature does not require the cities to plan. OAG 89-9.

The cities have the ultimate authority to plan for disaster emergencies. Although not statutorily required to plan for disaster emergencies, cities are strongly urged to do so in order to minimize the risk of injury to their citizens. OAG 89-9.

**46-1011. Local disaster emergencies.** — (1) A local disaster emergency may be declared only by a mayor or chairman of the county commissioners within their respective political subdivisions. It shall not be continued or renewed for a period in excess of seven (7) days except by or with the consent of the governing board of the political subdivision. Any order or proclamation declaring, continuing, or terminating a local disaster emergency shall be given prompt and general publicity and shall be filed promptly with the local county recorder.

(2) The effect of a declaration of a local disaster emergency is to activate the response and recovery aspects of any and all applicable local or intergovernmental disaster emergency plans and to authorize the furnishing of aid and assistance thereunder.

(3) No intergovernmental agency or official thereof may declare a local disaster emergency, unless expressly authorized by the agreement pursuant to which the agency functions. However, an intergovernmental disaster agency shall provide aid and services in accordance with the agreement pursuant to which it functions. [I.C., § 46-1011, as added by 1975, ch. 212, § 2, p. 584.]

**Cross ref.** Availability of armory for emergency and disaster relief, § 46-725.

**Cited in:** Union Pac. R.R. v. Idaho, 654 F. Supp. 1236 (D. Idaho 1987); Inama v. Boise County, — Idaho —, 63 P.3d 450 (2003).

**Opinions of Attorney General.** The responsibilities and authorities of the county commissioners to the citizens of an incorporated municipality in times of a disaster emergency are defined in the intergovernmental disaster emergency plan, if any,

agreed to by the city. Const., Art. 12, § 2, prohibits the county from unilaterally imposing its plan on an incorporated city. OAG 89-9.

Although § 46-1009 requires the counties to prepare a disaster emergency plan, there is no comparable statute explicitly requiring the cities to participate. Thus, unlike counties, cities are not required to plan for disaster emergencies. Once a disaster emergency occurs within the city's limits, however, the city government has the responsibility to handle

the situation. OAG 89-9.

The Idaho Disaster Preparedness Act of 1975 only "encourages" the cities to plan for disaster emergencies; the legislature does not require the cities to plan. OAG 89-9.

The cities have the ultimate authority to

plan for disaster emergencies. Although not statutorily required to plan for disaster emergencies, cities are strongly urged to do so in order to minimize the risk of injury to their citizens. OAG 89-9.

**46-1012. Compensation.** — (1) Each person within this state shall conduct himself and keep and manage his affairs and property in ways that will reasonably assist and will not unreasonably detract from the ability of the state, other political subdivisions, and the public to successfully meet disaster emergencies. This obligation includes appropriate personal service and use or restriction on the use of property in time of disaster emergency. This act neither increases nor decreases these obligations but recognizes their existence under the constitution and statutes of this state. Compensation for services or for the taking or use of property shall be only to the extent that obligations recognized herein are exceeded in a particular case and then only to the extent that the claimant may not be deemed to have volunteered his services or property without compensation.

(2) No personal services may be compensated by the state or any subdivision or agency thereof, except pursuant to statute or local law or ordinance.

(3) Compensation for property shall be only if the property was commandeered or otherwise used in coping with a disaster emergency and its use or destruction was ordered by the governor or his representative.

(4) Any person claiming compensation for the use, damage, loss, or destruction of property under this act shall file a claim therefor with the bureau in the form and manner the bureau provides.

(5) Unless the amount of compensation on account of property damaged, lost, or destroyed is agreed upon between the claimant and the bureau, the amount of compensation shall be calculated in the same manner as compensation due for taking of property pursuant to the condemnation laws of this state. [I.C., § 46-1012, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-1001.

**Cross ref.** Assessment of damages in condemnation proceedings, § 7-711.

**Sec. to sec. ref.** This section is referred to in § 46-1008.

#### ANALYSIS

Compensation.

County immune.

Exhaustion of statutory remedy.

Scope of immunity.

#### Compensation.

Section 46-1012(3) is clear and unambiguous: compensation for property damaged, lost, or destroyed can be recovered under the Idaho Disaster Preparedness Act of 1975, § 46-1001 et seq., only if its use or destruction was ordered by the governor or his representative; § 46-1017 is likewise clear and unambiguous,

the statute as written does not limit the scope of immunity to damages compensable under § 46-1012. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

#### County Immune.

Trial court did not err when it dismissed an equipment owner's suit against a county for the loss of his front-end loader where the county was engaged in disaster relief activities, was acting under declaration of disaster emergency, and complying with Idaho Disaster Preparedness Act, § 46-1001 et seq., despite the fact that the owner had not consented to its use. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

#### Exhaustion of Statutory Remedy.

Owners of flooded farmland were not required to exhaust the remedy provided by this section, since the governor's declaration of an emergency did not refer to the use or destruc-



tion of landowners' property nor did the governor designate any of the governmental agencies involved in the emergency actions as his personal representative. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

#### Scope of Immunity.

Section 46-1017 did not limit the scope of immunity to damages compensable under § 46-1012. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

**46-1013. Communications.** — The bureau shall ascertain what means exist for rapid and efficient communications in times of disaster emergencies. The bureau shall consider the desirability of supplementing these communications [communication] resources or of integrating them into a comprehensive state or state-federal telecommunications or other communication system or network. The bureau shall make recommendations to the governor as appropriate. [I.C., § 46-1013, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** The bracketed word "communication" was inserted by the compiler.

**46-1014. Mutual aid.** — (1) Political subdivisions not participating in the intergovernmental arrangements pursuant to this act nevertheless shall be encouraged and assisted by the bureau to conclude suitable arrangement for furnishing mutual aid in coping with disasters. The arrangements shall include provisions of aid by persons and units in public employ.

(2) In passing upon local disaster plans, the bureau shall consider whether they contain adequate provisions for the rendering and receipt of mutual aid. [I.C., § 46-1014, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** For words "this act" see Compiler's note, § 46-1001.

**Opinions of Attorney General.** Although § 46-1009 requires the counties to prepare a disaster emergency plan, there is no comparable statute explicitly requiring the cities to participate. Thus, unlike counties, cities are not required to plan for disaster emergencies. Once a disaster emergency occurs within the city's limits, however, the city government has the responsibility to handle the situation. OAG 89-9.

The Idaho Disaster Preparedness Act of 1975 only "encourages" the cities to plan for disaster emergencies; the legislature does not require the cities to plan. OAG 89-9.

The cities have the ultimate authority to plan for disaster emergencies. Although not statutorily required to plan for disaster emergencies, cities are strongly urged to do so in order to minimize the risk of injury to their citizens. OAG 89-9.

**46-1015. Weather modification.** — The bureau shall keep continuously appraised of weather conditions which present danger of precipitation or other climatic activity severe enough to constitute a disaster. If the bureau determines that precipitation that may result from weather modification operations, either by itself or in conjunction with other precipitation or climatic conditions or activity, would create or contribute to the severity of a disaster, it shall direct the officer or agency empowered to issue permits for weather modification operations to suspend the issuance of the permits. Thereupon, no permits may be issued until the bureau informs the officer or agency that the danger has passed. [I.C., § 46-1015, as added by 1975, ch. 212, § 2, p. 584.]

**Cross ref.** Weather modification districts,  
§ 22-4301.

**46-1016. Liability for property damage, bodily injury or death. —** No person, partnership, corporation, association, the state of Idaho or any political subdivision thereof or other entity who owns, leases, controls, occupies or maintains any building or premises which shall have been designated by proper authority for civil defense as a shelter from destructive operations or attacks by enemies of the United States shall be liable to any person for property damages, bodily injury or death resulting from or caused by the condition of said building or premises or as a result of any act or omission or in any way arising from the designation of such premises or buildings as a shelter when such person has entered or gone upon or into said building or premises for the purpose of seeking refuge therein during destructive operations or attacks by enemies of the United States or during tests ordered by lawful authority, except for acts of wilfull negligence by the owner or occupant of such building or premises or other person responsible for the maintenance thereof, or by his servants, agents or employees. [I.C., § 46-1016, as added by 1975, ch. 212, § 2, p. 584.]

**46-1017. Immunity. —** Neither the state nor any political subdivision thereof nor other agencies, nor, except in cases of wilful misconduct, the agents, employees or representatives of any of them engaged in any civil defense or disaster relief activities, acting under a declaration by proper authority nor, except in cases of wilful misconduct or gross negligence, any person, firm, corporation or entity under contract with them to provide equipment or work on a cost basis to be used in disaster relief, while complying with or attempting to comply with this act or any rule or regulation promulgated pursuant to the provisions of the act, shall be liable for the death of or any injury to persons or damage to property as a result of such activity. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this act or under the workmen's compensation law or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of congress. [I.C., § 46-1017, as added by 1975, ch. 212, § 2, p. 584.]

**Compiler's notes.** For words "this act" see  
Compiler's note, § 46-1001.

Section 3 of S.L. 1975, ch. 212 declared an  
emergency. Approved March 28, 1975.

**Cited in:** Union Pac. R.R. v. Idaho, 654 F.  
Supp. 1236 (D. Idaho 1987).

#### ANALYSIS

Compensation.  
County immune.  
Disaster relief efforts.  
Limitations on immunity.  
Public necessity.  
Requirements.

#### Compensation.

Section 46-1017 did not limit the scope of  
immunity to damages compensable under

§ 46-1012. Inama v. Boise County, — Idaho  
—, 63 P.3d 450 (2003).

If § 46-1017 grants immunity from liability  
to a governmental entity regarding a partic-  
ular loss, then compensation for inverse con-  
demnation cannot be awarded under Const.  
Art. I, § 14. Inama v. Boise County, — Idaho  
—, 63 P.3d 450 (2003).

#### County Immune.

Trial court did not err when it dismissed an  
equipment owner's suit against a county for  
the loss of his front-end loader where the  
county was engaged in disaster relief activi-  
ties, was acting under declaration of disaster  
emergency, and complying with Idaho Disas-  
ter Preparedness Act, § 46-1001 et seq., de-



spite the fact that the owner had not consented to its use. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

#### **Disaster Relief Efforts.**

Fire fighting is precisely the type of activity that this section was intended to cover, and as such, the statute provides immunity to those state agencies involved in disaster relief efforts. This includes the Idaho National Guard. The fact that the statute does not refer to the National Guard specifically is of no consequence; the statute does not name any specific agencies or organizations but lists only broad categories such as the "state," "any political subdivision thereof," "other agencies" and their "agents, employees or representatives." *Baca v. State*, 119 Idaho 782, 810 P.2d 720 (1991).

#### **Limitations on Immunity.**

Scope of immunity granted to a governmental agency by § 46-1017 is not limited to

particular theories of tort liability. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

#### **Public Necessity.**

Section 46-1017, was intended by the legislature to codify a version of the doctrine of public necessity; the statute provides that no political subdivision of the state, engaged in any disaster relief activities, acting under a declaration by proper authority while complying or attempting to comply with this act, shall be liable for damage to property as a result of such activity. *Inama v. Boise County*, — Idaho —, 63 P.3d 450 (2003).

#### **Requirements.**

In a suit by owners of flooded farmland for inverse condemnation compensation, actions of governmental agencies were immunized only if they took place during the period of declared emergency by the county commissioners or the governor. *Marty v. State*, 117 Idaho 133, 786 P.2d 524 (1989).

**46-1018. Interstate mutual aid compact.** — The state of Idaho hereby enacts into law and enters into the interstate mutual aid compact with those states who agree and enact the interstate mutual aid compact in accordance with the terms of the compact, which compact is substantially as follows:

## **INTERSTATE MUTUAL AID COMPACT**

### **Article I**

The purpose of this compact is to provide voluntary assistance among participating states in responding to any disaster or imminent disaster that overextends the ability of local and state governments to reduce, counteract, or remove the danger. Assistance may include but is not limited to rescue, fire, police, medical, communication, and transportation services and facilities to cope with problems which require use of special equipment, trained personnel, or personnel in large numbers not locally available.

### **Article II**

Article I, Section 10, of the Constitution of the United States permits a state to enter into an agreement or compact with another state, subject to the consent of Congress. Congress, through enactment of 50 U.S.C. 2281(g) and 2283 and the executive branch, by issuance of Executive Order No. 10186 of December 1, 1950, encourages the states to enter into emergency, disaster, and civil defense mutual aid agreements or pacts.

### **Article III**

It is agreed by participating states that the following conditions will guide implementation of the compact:

(1) Participating states through their designated officials are authorized to request and receive assistance from a participating state. Requests will be

granted only if the requesting state is committed to the mitigation of the emergency and other resources are not immediately available.

(2) Requests for assistance may be verbal or in writing. If the request is made by other than written communication, it must be confirmed in writing as soon as practical after the request. A written request shall provide an itemization of equipment and operators, types of expertise, and personnel or other resources needed. Each request must be signed by an authorized official.

(3) Personnel and equipment of the aiding state made available to the requesting state shall, whenever possible, remain under the control and direction of the aiding state. The activities of personnel and equipment of the aiding state must be coordinated by the requesting state.

(4) An aiding state has the right to withdraw some or all of its personnel and equipment whenever the personnel and equipment are needed by that state. Notice of intention to withdraw should be communicated to the requesting state as soon as possible.

#### Article IV

(1) The requesting state shall reimburse the aiding state as soon as possible after the receipt by the requesting state of an itemized voucher requesting reimbursement of costs.

(2) Any state rendering aid pursuant to this compact must be reimbursed by the state receiving such aid for any damage to, loss of, or expense incurred in the operation of any equipment used in responding to a request for aid, and for the cost incurred in connection with such requests.

(3) Any state rendering aid pursuant to this compact must be reimbursed by the state receiving such aid for the cost of compensation and death benefits to injured officers, agents, or employees and their dependents or representatives if such officers, agents, or employees sustain injuries or are killed while rendering aid pursuant to this arrangement and such payments are made in the same manner and on the same terms as if the injury or death were sustained within the aiding state.

#### Article V

(1) All privileges and immunities from liability, exemptions from law, ordinances, and rules and all pension, disability relief, workers' compensation, and other benefits that apply to the activity of officers, agents, or employees when performing their respective functions within the territorial limits of their respective political subdivisions apply to them to the same extent while engaged in the performance of any of their functions and duties extraterritorially under the provisions of this compact.

(2) All privileges and immunities from liability, exemptions from law, ordinances, and rules and workers' compensation and other benefits that apply to duly enrolled or registered volunteers when performing their respective functions at the request of their state and within its territorial limits apply to the same extent while performing their functions extraterritorially under the provisions of this compact. Volunteers may include but



are not limited to physicians, surgeons, nurses, dentists, structural engineers, and trained search and rescue volunteers.

(3) The signatory states, their political subdivisions, municipal or public corporations, and other public agencies shall hold harmless the corresponding entities and personnel thereof from the other states with respect to the acts and omissions of its own agents and employees that occur while providing assistance pursuant to the common plan.

(4) Nothing of this arrangement may be construed as repealing or impairing any existing interstate mutual aid agreements.

(5) Upon enactment of this compact by two (2) or more states, and annually by each January 1 thereafter, the participating states will exchange with each other the names of officials designated to request and provide services under this arrangement. In accordance with the cooperative nature of this arrangement, it is permissible and desirable for the states to exchange operational procedures to be followed in requesting assistance and reimbursing expenses.

(6) This compact becomes effective and is binding upon the states so acting when it has been enacted into law by any two (2) states. Thereafter, this compact becomes effective and binding as to any other state upon similar action by such state.

(7) This compact remains binding upon a party state until it enacts a law repealing the compact and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal may not take effect until the 30th consecutive day after the notice has been sent. Such withdrawal does not relieve the withdrawing state from its obligations assumed under this compact prior to the effective date of withdrawal. [I.C., § 46-1018, as added by 1986, ch. 107, § 2, p. 294.]

**Compiler's notes.** Section 1 of S.L. 1986, ch. 107 is compiled as § 46-1010.

Section 3 of S.L. 1986, ch. 107 declared an emergency. Approved March 22, 1986.

**46-1018A. Emergency management assistance compact.** — The legislature of the state of Idaho hereby authorizes the governor of the state of Idaho to enter into a compact on behalf of the state of Idaho with any other state legally joining therein, in the form substantially as follows:

## EMERGENCY MANAGEMENT ASSISTANCE COMPACT

### ARTICLE I

#### PURPOSES AND AUTHORITIES

(1) This compact is made and entered into by and between the participating member states which enact this compact, hereinafter called party states. For the purposes of this agreement, the term "states" is taken to mean the several states, the Commonwealth of Puerto Rico, the District of Columbia, and all United States territorial possessions.

(2) The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency

or disaster that is duly declared by the governor of the affected state(s), whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.

(3) This compact shall also provide for mutual cooperation in emergency-related exercises, testing, or other training activities using equipment and personnel simulating performance of any aspect of the giving and receiving of aid by party states or subdivisions of party states during emergencies, such actions occurring outside actual declared emergency periods. Mutual assistance in this compact may include the use of the states' national guard forces, either in accordance with the national guard mutual assistance compact or by mutual agreement between states.

## ARTICLE II

### GENERAL IMPLEMENTATION

(1) Each party state entering into this compact recognizes many emergencies transcend political jurisdictional boundaries and that intergovernmental coordination is essential in managing these and other emergencies under this compact. Each state further recognizes that there will be emergencies which require immediate access and present procedures to apply outside resources to make a prompt and effective response to such an emergency. This is because few, if any, individual states have all the resources they may need in all types of emergencies or the capability of delivering resources to areas where emergencies exist.

(2) The prompt, full, and effective utilization of resources of the participating states, including any resources on hand or available from the federal government or any other source, that are essential to the safety, care, and welfare of the people in the event of any emergency or disaster declared by a party state, shall be the underlying principle on which all articles of this compact shall be understood.

(3) On behalf of the governor of each state participating in the compact, the legally designated state official who is assigned responsibility for emergency management will be responsible for formulation of the appropriate interstate mutual aid plans and procedures necessary to implement this compact.

## ARTICLE III

### PARTY STATE RESPONSIBILITIES

(1) It shall be the responsibility of each party state to formulate procedural plans and programs for interstate cooperation in the performance of the responsibilities listed in this article. In formulating such plans, and in carrying them out, the party states, insofar as practical, shall:

(a) Review individual state hazards analysis and, to the extent reasonably possible, determine all those potential emergencies the party states might jointly suffer, whether due to natural disaster, technological haz-



ard, man-made disaster, emergency aspects of resource shortages, civil disorders, insurgency or enemy attack.

(b) Review party states' individual emergency plans and develop a plan which will determine the mechanism for the interstate management and provision of assistance concerning any potential emergency.

(c) Develop interstate procedures to fill any identified gaps and to resolve any identified inconsistencies or overlaps in existing or developed plans.

(d) Assist in warning communities adjacent to or crossing the state boundaries.

(e) Protect and assure uninterrupted delivery of services, medicines, water, food, energy and fuel, search and rescue, and critical lifeline equipment, services, and resources, both human and material.

(f) Inventory and set procedures for the interstate loan and delivery of human and material resources, together with procedures for reimbursement or forgiveness.

(g) Provide, to the extent authorized by law, for temporary suspension of any statutes or ordinances that restrict the implementation of the above responsibilities.

(2) The authorized representative of a party state may request assistance of another party state by contacting the authorized representative of that state. The provisions of this compact shall only apply to requests for assistance made by and to authorized representatives. Requests may be verbal or in writing. If verbal, the request shall be confirmed in writing within thirty (30) days of the verbal request. Requests shall provide the following information:

(a) A description of the emergency service function for which assistance is needed, including, but not limited to, fire services, law enforcement, emergency medical, transportation, communications, public works and engineering, building inspection, planning and information assistance, mass care, resource support, health and medical services, and search and rescue.

(b) The amount and type of personnel, equipment, materials and supplies needed, and a reasonable estimate of the length of time they will be needed.

(c) The specific place and time for staging of the assisting party's response and a point of contact at that location.

(3) There shall be frequent consultation between state officials who have assigned emergency management responsibilities and other appropriate representatives of the party states with affected jurisdictions and the United States government, with free exchange of information, plans, and resource records relating to emergency capabilities.

## ARTICLE IV

### LIMITATIONS

Any party state requested to render mutual aid or conduct exercises and training for mutual aid shall take such action as is necessary to provide and

make available the resources covered by this compact in accordance with the terms hereof; provided that it is understood that the state rendering aid may withhold resources to the extent necessary to provide reasonable protection for such state. Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (except that of arrest unless specifically authorized by the receiving state), duties, rights, and privileges as are afforded forces of the states in which they are performing emergency services. Emergency forces will continue under the command and control of their regular leaders, but the organizational units will come under the operational control of the emergency service authorities of the state receiving assistance. These conditions may be activated, as needed, only subsequent to a declaration of a state of emergency or disaster by the governor of the party state that is to receive assistance or upon commencement of exercises or training of mutual aid and shall continue so long as the exercises or training for mutual aid are in progress, the state of emergency or disaster remains in effect, or loaned resources remain in the receiving state, whichever is longer.

## ARTICLE V

### LICENSES AND PERMITS

Whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the governor of the requesting state may prescribe by executive order or otherwise.

## ARTICLE VI

### LIABILITY

Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes. No party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account of any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith in this article shall not include willful misconduct, gross negligence or recklessness.

## ARTICLE VII

### SUPPLEMENTARY AGREEMENTS

Inasmuch as it is probable that the pattern and detail of the machinery for mutual aid among two (2) or more states may differ from that among the



states that are party hereto, this compact contains elements of a broad base common to all states, and nothing herein contained shall preclude any state from entering into supplementary agreements with another state or affect any other agreements already in force between states. Supplementary agreements may comprehend, but shall not be limited to, provisions for evacuation and reception of injured and other persons and the exchange of medical, fire, police, public utility, reconnaissance, welfare, transportation and communications personnel, and equipment and supplies.

## ARTICLE VIII

### COMPENSATION

Each party state shall provide for the payment of compensation and death benefits to injured members of the emergency forces of that state and representatives of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or death were sustained within their own state.

## ARTICLE IX

### REIMBURSEMENT

Any party state rendering aid in another state pursuant to this compact shall be reimbursed by the party state receiving such aid for any loss or damage to or expense incurred in the operation of any equipment and the provisions of any service in answering a request for aid and for the costs incurred in connection with such requests; provided, that any aiding party state may assume in whole or in part such loss, damage, expense, or other cost, or may loan such equipment or donate such services to the receiving party state without charge or cost; and provided further, that any two (2) or more party states may enter into supplementary agreements establishing a different allocation of costs among those states. Article VIII expenses shall not be reimbursable under this provision.

## ARTICLE X

### EVACUATION

Plans for the orderly evacuation and interstate reception of portions of the civilian population as the result of any emergency or disaster of sufficient proportions to so warrant, shall be worked out and maintained between the party states and the emergency management/services directors of the various jurisdictions where any type of incident requiring evacuations might occur. Such plans shall be put into effect by request of the state from which evacuees come and shall include the manner of transporting such evacuees, the number of evacuees to be received in different areas, the manner in which food, clothing, housing, and medical care will be provided,

the registration of the evacuees, the providing of facilities for the notification of relatives or friends, and the forwarding of such evacuees to other areas or the bringing in of additional materials, supplies, and all other relevant factors. Such plans shall provide that the party state receiving evacuees and the party state from which the evacuees come shall mutually agree as to reimbursement of out-of-pocket expenses incurred in receiving and caring for such evacuees, for expenditures for transportation, food, clothing, medicines and medical care, and like items. Such expenditures shall be reimbursed as agreed by the party state from which the evacuees come. After the termination of the emergency or disaster, the party state from which the evacuees come shall assume the responsibility for the ultimate support of repatriation of such evacuees.

## ARTICLE XI

### IMPLEMENTATION

(1) This compact shall become operative immediately upon its enactment into law by any two (2) states; thereafter this compact shall become effective as to any other state upon its enactment by such state.

(2) Any party state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall take effect until thirty (30) days after the governor of the withdrawing state has given notice in writing of such withdrawal to the governors of all other party states. Such action shall not relieve the withdrawing state from obligations assumed hereunder prior to the effective date of withdrawal.

(3) Duly authenticated copies of this compact and of such supplementary agreements as may be entered into shall, at the time of their approval, be deposited with each of the party states and with the federal emergency management agency and other appropriate agencies of the United States government.

## ARTICLE XII

### VALIDITY

This compact shall be construed to effectuate the purposes stated in Article I hereof. If any provision of this compact is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the compact and the applicability thereof to other persons and circumstances shall not be affected thereby.

## ARTICLE XIII

### ADDITIONAL PROVISIONS

Nothing in this compact shall authorize or permit the use of military force by the national guard of a state at any place outside that state in any



emergency for which the President is authorized by law to call into federal service the militia, or for any purpose for which the use of the army or the air force would in the absence of express statutory authorization be prohibited under section 1385 of title 18, United States Code. [I.C., § 46-1018A, as added by 2001, ch. 140, § 1, p. 501.]

**46-1019. Emergency response.** — (1) There is hereby created an emergency response commission in the office of the governor. The commission shall consist of the following state and local officials, industry representatives, or their designees: the adjutant general of the Idaho national guard; the director of the department of health and welfare; the state fire marshal; the director of the Idaho state police; the director of the Idaho transportation department; the director of the department of agriculture; the director of the department of lands; the director of the Idaho geological survey; the director of the department of water resources; the director of the department of environmental quality; the coordinator for INEEL oversight; one (1) member representing Idaho cities; one (1) member of an organization representing farmers or ranchers; one (1) member representing Idaho counties; one (1) member representing the hazardous waste or materials transportation industry; one (1) member representing a user of hazardous materials; one (1) member representing the Idaho state fire chief's association; one (1) member representing the Idaho county sheriff's association; one (1) member of the Idaho police chief's association; one (1) member representing the Idaho emergency management association; and one (1) member at-large representing the citizens of the state of Idaho. The last ten (10) members shall be appointed by the governor to serve staggered three (3) year terms. The manager of the bureau of disaster services and the manager of the bureau of hazardous materials shall be nonvoting members of the commission. All members shall serve without compensation, except that members who are not state officers or employees shall be compensated as provided in section 59-509(g), Idaho Code. The governor shall appoint a chairman from the appointees. The attorney general shall provide legal counsel to the commission.

(2) The commission shall act as an all-hazards advisory and coordinating body to the governor for all types of disasters and emergencies which could affect the citizens of Idaho. They shall review, evaluate, report and advise the governor on state and local plans and programs to prepare for, respond to, and recover from all types of disaster emergencies. [I.C., § 46-1019, as added by 1997, ch. 121, § 11, p. 357; am. 2000, ch. 442, § 1, p. 1402; am. 2000, ch. 469, § 106, p. 1450; am. 2001, ch. 103, § 86, p. 253.]

**Compiler's notes.** This section was amended by two 2000 acts — ch. 442, § 1 and ch. 469, § 106, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 442, § 1, in subsection 1, in the second sentence, substituted "the coordinator for INEEL oversight" for "the coordinator for INEL oversight" following "the director of the department of

water resources"; inserted "one (1) member representing the Idaho emergency management association" following "one (1) member of the Idaho police chief's association" and in the third sentence, substituted "The last ten (10) members shall be appointed by the governor to serve staggered three (3) year terms" for "The last nine (9) members shall be appointed by the governor to serve staggered three (3) year terms."

The 2000 amendment by ch. 469, § 106, in subsection 1, substituted "director of the Idaho state police" for "director of the department of law enforcement" following "the state fire marshal" and substituted "the coordinator for INEEL oversight" for "the coordinator for INEL oversight" following "the director of the department of water resources."

Section 10 of S.L. 1997, ch. 121 is compiled as § 46-1002.

Section 2 of S.L. 2000, ch. 442, is compiled as § 46-1025.

Sections 105 and 107 of S.L. 2000, ch. 469, are compiled as §§ 41-298 and 49-102, respectively.

Sections 85 and 87 of S.L. 2001, ch. 103 are compiled as §§ 42-3910 and 47-1315, respectively.

**46-1020. Purpose and findings.** — (1) The legislature of the state of Idaho finds:

- (a) That recurring floods in Idaho threaten human life, health and property and that the public interest requires that the floodplains of Idaho be managed and regulated in order to minimize flood hazards to life, health and property.
- (b) That it is the policy of this state to reduce flood damage and the number of people and structures at risk in flood hazard areas through proper floodplain management, including such measures as floodplain zoning ordinances which require structures to be built at a flood protection elevation and/or with floodproofing.
- (c) That local units of government have the primary responsibility for planning, adoption and enforcement of land use regulations to accomplish this proper floodplain management. Furthermore, they are best able to adopt and implement comprehensive floodplain management programs that include nonregulatory techniques to accomplish the purposes of this act in cooperation with federal, state and local agencies.
- (2) The purpose of this act is:
  - (a) To protect human life, health and property;
  - (b) To preserve floodplains for the purpose of carrying and storing flood waters;
  - (c) To reduce the public cost of providing emergency services, flood control structures and rebuilding public works damaged by floods;
  - (d) To protect the tax base and jobs in Idaho;
  - (e) To reduce the threat of increased damage to existing development;
  - (f) To encourage the orderly development and wise use of floodplains;
  - (g) To minimize interruptions to business;
  - (h) To prevent increased flooding and erosion caused by improper development. [I.C., § 46-1020, as added by 1998, ch. 301, § 1, p. 992.]

**Compiler's notes.** The word "this act" as §§ 46-1020, 46-1021, 46-1022, 46-1023, and refers to S.L. 1998, ch. 301, which is compiled 46-1024.

**46-1021. Definitions.** — As used in this act:

- (1) "Development" means any manmade change to improved or unimproved real estate, including, but not limited to, the construction of buildings, structures or accessory structures, or the construction of additions or substantial improvements to buildings, structures or accessory structures; the placement of mobile homes; mining, dredging, filling, grading, paving, excavation or drilling operations; and the deposition or extrac-



tion of materials; specifically including the construction of dikes, berms and levees.

(2) "Flood" means a general or temporary condition of partial or complete inundation of normally dry land areas caused by the overflow or rise of river, ocean, streams or lakes, or the unusual and rapid accumulation or runoff of surface waters from any source.

(3) "Flood fringe" is that portion of the floodplain outside of the floodway covered by floodwaters during the regulatory flood.

(4) "Floodplain" is the land that has been or may be covered by floodwaters, or is surrounded by floodwater and inaccessible, during the occurrence of the regulatory flood. The riverine floodplain includes the floodway and the flood fringe.

(5) "Floodplain management" is the analysis and integration of the entire range of measures that can be used to prevent, reduce or mitigate flood damage in a given location, and that can protect and preserve the natural, environmental, historical, and cultural values of the floodplain.

(6) "Floodproofing" means the modifications of structures, their sites, building contents and water and sanitary facilities, to keep water out or reduce the effects of water entry.

(7) "Flood protection elevation" means an elevation that shall correspond to the elevation of the one percent (1%) chance flood (one hundred (100) year flood) plus any increased flood elevation due to floodway encroachment, plus any required freeboard.

(8) "Floodway" is the channel of the river or stream and those portions of the floodplain adjoining the channel required to discharge and store the floodwater or flood flows associated with the regulatory flood.

(9) "Freeboard" represents a factor of safety usually expressed in terms of a certain amount of feet above a calculated flood level. Freeboard shall compensate for the many unknown factors that contribute to flood heights greater than the height calculated. These unknown factors include, but are not limited to, ice jams, debris accumulation, wave action, obstruction of bridge openings and floodways, the effects of urbanization on the hydrology of the watershed, loss of flood storage areas due to development and the sedimentation of a river or stream bed.

(10) "Local government," in the context of this chapter, means any county or city having planning and zoning authority to regulate land use within its jurisdiction.

(11) "Mitigation" means any action taken which will reduce the impact, damage or cost of the next flood that occurs.

(12) "Person" means any individual, group of individuals, corporation, partnership, association, political subdivision, public or private agency or entity.

(13) "Regulatory flood" is a flood determined to be representative of large floods known to have occurred in Idaho and which may be expected to occur on a particular stream because of like physical characteristics. The regulatory flood is based upon a statistical analysis of stream flow records available for the watershed or an analysis of rainfall and runoff characteristics in the watershed. In inland areas, the flood frequency of the regulatory

flood is once in every one hundred (100) years; this means that in any given year there is a one percent (1%) chance that a regulatory flood may occur or be exceeded. [I.C., § 46-1021, as added by 1998, ch. 301, § 1, p. 992.]

**Compiler's notes.** For words "this act" see  
Compiler's notes § 46-1020.

**46-1022. Local governments may adopt floodplain zoning ordinances.** — Subject to the availability of adequate mapping and data to properly identify the floodplains, if any, within their jurisdiction, each local government is encouraged to adopt a floodplain map and floodplain management ordinance which identifies these floodplains and which requires, at a minimum, that any development in a floodplain must be constructed at a flood protection elevation and/or have adequate floodproofing. The local government may regulate all mapped and unmapped floodplains within their jurisdiction. Nothing in this act shall prohibit a local government from adopting more restrictive standards than those contained in this chapter. [I.C., § 46-1022, as added by 1998, ch. 301, § 1, p. 992.]

**Compiler's notes.** For words "this act" see  
Compiler's notes § 46-1020.

**46-1023. Enforcement and sanctions.** — (1) Development constructed or maintained in violation of any local floodplain management ordinance that conforms to the provisions of this chapter is hereby declared to be a public nuisance and the creation thereof may be enjoined and the maintenance thereof may be abated by action of the state, any local unit of government of the state or any citizen thereof.

(2) If, after the effective date of this chapter, a local government allows any development in a floodplain below the flood protection elevation without adequate floodproofing, that development shall not, in the event of a disaster emergency involving flooding in that floodplain, be eligible to receive any matching funds from the state for any federal disaster assistance program which may be available as a result of said flooding in that floodplain. The owner of the development will be required to rely on flood insurance to insure their property against the risk of loss incurred by their development in the floodplain in contravention of the intent of this chapter. [I.C., § 46-1023, as added by 1998, ch. 301, § 1, p. 992.]

**46-1024. Severability.** — If any provision of this chapter or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the chapter that can be given effect without the invalid provision or application, and to this end the provisions of the chapter are severable. [I.C., § 46-1024, as added by 1998, ch. 301, § 1, p. 992.]

**46-1025. Federal funds to political subdivisions.** — (1) Annually, the chief of the Idaho bureau of disaster services shall prepare a written summary of all grants received from the federal emergency management



agency to be distributed to the forty-four (44) county commission chairmen. The summary shall list those federal funds that are eligible for direct assistance to local disaster agencies in accordance with section 46-1009(2), Idaho Code, and those funds that are limited to use by the state and not eligible for direct assistance to local disaster agencies.

(2) Not less than thirty-four percent (34%) of the eligible direct assistance funds shall be subgranted by the Idaho bureau of disaster services to the local disaster agencies. Funds shall be distributed to the local disaster agencies subject to the provisions and regulations of the Idaho bureau of disaster services, the federal emergency management agency through the Robert T. Stafford Act, title 44 of the code of federal regulations, and pertinent circulars published by the United States office of management and budget.

(3) Direct financial assistance to the local disaster agencies is not an entitlement. Subgrants are awarded through the Idaho bureau of disaster services for the purpose of assisting counties to achieve goals and objectives outlined in an approved county grant proposal. [I.C., § 46-1025, as added by 2000, ch. 442, § 2, p. 1402.]

**Compiler's notes.** Section 1 of S.L. 2000, ch. 442, is compiled as § 46-1019.

## CHAPTER 11

### CODE OF MILITARY JUSTICE

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- 46-1188 — 46-1190. [Repealed.]
- 46-1191 — 46-1193. [Amended and Redesignated.]
- 46-1194. [Repealed.]

**46-1101. Short title.** — This act may be cited and referred to as the "Idaho Code of Military Justice." [I.C., § 46-1101 as added by 1975, ch. 147, § 4, p. 339.]

**Compiler's notes.** The words "this act" refer to S.L. 1975, ch. 147 compiled as §§ 46-1101 — 46-1194.

Sections 1, 2, and 3 of S.L. 1975, ch. 147 repealed chapters 5, 9 of this title and § 46-805, respectively.

**46-1102. Definitions.** — The definitions used in the command, administration, supply, training, discipline and employment of the armed forces of the United States, unless clearly inapplicable or contradictory, are adopted with respect to the Idaho military except as otherwise provided in this act. As used in this act:



(1) "Idaho military" and "military" refers to all components of the Idaho national guard and the militia of the state of Idaho, as defined in section 46-103, Idaho Code.

(2) "Idaho national guard" means both the Idaho army national guard and the Idaho air national guard.

(3) "In federal service" and "not in federal service" mean the same as those terms are used and construed in federal laws and regulations.

(4) "Officer" means both a commissioned officer and a warrant officer of the Idaho military, unless a distinction between commissioned officer and warrant officer is clearly evident.

(5) "Superior officer" means an officer superior in rank or command.

(6) "Enlisted person" means any person who is serving in an enlisted grade in any unit of the Idaho military.

(7) "Military court" means a court-martial.

(8) "Commanding officer" means a commissioned officer or warrant officer who is in command of any unit of the Idaho military other than a platoon.

(9) "Command" means any unit of the Idaho military other than a platoon.

(10) "Legal officer" means any legally trained commissioned officer of the Idaho national guard who is certified by the judge advocate general of his respective service to perform legal duties in the military.

(11) "Duty status" includes periods when a military member is on duty or is lawfully ordered to duty.

(12) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any person who has an interest other than an official interest in the prosecution of the accused.

(13) "Convening authority" includes, in addition to the person who convened the court, a commissioned officer acting in the capacity of the convening authority, even if in a temporary status, or a successor in command.

(14) "May" is used in a permissive sense. The words "no person may ...." mean that no person is required, authorized, or permitted to do the act prescribed.

(15) "Shall" is used in a mandatory sense.

(16) "Code" means this chapter.

(17) "Arrest" is the taking of a person into custody.

(18) "Military judge" means that individual, either military or civilian, appointed pursuant to section 46-1114(2), Idaho Code, to preside over courts-martial or to perform other judicial duties under this chapter.

(19) "Manual for courts-martial" means that document prescribed by Presidential Executive Order 12473, August 1, 1984; as currently amended (1995 Edition).

(20) "Uniform code of military justice" means 10 U.S.C. section 801, et seq., as amended.

(21) "Enemy" includes organized armed forces of a party hostile to the state or the United States in time of war, any hostile body that the forces of the state or the United States may be opposing, such as a rebellious mob or

a band of renegades, and includes civilians as well as members of military organizations. [I.C., § 46-1103, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 1, p. 190; am. and redesisg. 1998, ch. 176, § 1, p. 624.]

**Compiler's notes.** For words "this act" see compiler's note, § 46-1101.

This section was formerly compiled as § 46-1103.

**46-1103. Persons subject to the code.** — The Idaho code of military justice applies to all members of the Idaho military not in federal service when they are in or lawfully ordered to be in a duty status and to all members of the military forces of any other state when in or ordered to be in a duty status while they are assigned or attached to any command within the Idaho military, unless jurisdiction has been exclusively reserved by the other state's general court-martial convening authority, and at any time any of the aforesaid members engage in activities which tend to bring discredit upon the Idaho national guard or disrupt the good order and discipline thereof. [I.C., § 46-1104, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 2, p. 190; am. and redesisg. 1998, ch. 176, § 2, p. 624.]

**Compiler's notes.** Former § 46-1103 was amended and redesignated as § 46-1102 by S.L. 1998, ch. 176, § 1.

This section was formerly compiled as § 46-1104.

**Cross ref.** Supernumerary officers amena-

ble to court-martial for military offenses, § 46-207.

**Collateral References.** Comment note on courts-martial jurisdiction over members of armed forces for "civilian" offenses. 14 A.L.R. Fed. 152.

**46-1104. Application of code — All places within state — Persons serving outside the state — When jurisdiction attaches — Venue.** — (1) This code shall be applicable in all places within the state. It shall also apply to all persons subject to this code while serving outside the state and while going to and returning from such service outside the state in like manner and to the same extent as when such persons are serving within the state.

(2) Courts-martial may be convened and held in units of the Idaho military while serving outside the state with the same jurisdiction and powers as if held within the state, and offenses committed outside the state may be tried and punished either within the state or outside the state.

(3) Court-martial jurisdiction attaches only upon the preferral of charges pursuant to the provisions of section 46-1118, Idaho Code, for an offense punishable under this code which occurred during a period when a person subject to the code was ordered to or did actually perform duty with the Idaho military under state or federal law. Once jurisdiction is properly attached, the convening and holding of a court-martial may be accomplished at any subsequent time, subject to the limitations of section 46-1131, Idaho Code.

(4) Venue for a court-martial shall be determined by the convening authority, considering factors including, but not limited to, location of the offense, residence of the accused, unit of assignment and availability of witnesses. An accused is not relieved from amenability to this code for an offense to which jurisdiction has properly attached by virtue of his separation or transfer from the Idaho military after the date of the alleged offense,



and such an accused shall, from the time of apprehension or the service of charges required by section 46-1123, Idaho Code, whichever occurs first, be subject to this code and trial by court-martial on that charge and for any other offenses committed while awaiting trial or completing any sentence imposed for that offense. [I.C., § 46-1105, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 3, p. 190; am. and redesisg. 1998, ch. 176, § 3, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1104 was amended and redesignated as § 46-1103 by S.L. 1998, ch. 176, § 2.

This section was formerly compiled as § 46-1105.

Section 4 of S.L. 1984, ch. 92 is compiled as § 46-1107.

**Cross ref.** Uniform code of military justice in force when national guard on active duty, § 46-603.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 250-361.

6 C.J.S., Armed Services, §§ 169, 298.

**46-1105. Jurisdiction to try persons who fraudulently obtained discharge.** — Each person discharged from the Idaho military who is later charged with having fraudulently obtained his discharge is, subject to the applicable statute of limitations, subject to trial by court-martial on that charge and is, after apprehension or the service of charges required by section 46-1123, Idaho Code, whichever occurs first, subject to this code for that trial. [I.C., § 46-1106 as added by 1975, ch. 147, § 4, p. 339; am. and redesisg. 1998, ch. 176, § 4, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1105 was amended and redesignated as § 46-1104 by S.L. 1998, ch. 176, § 3.

This section was formerly compiled as § 46-1106.

**Cross ref.** Fraudulent separation from national guard, § 46-1155.

Statute of limitations, § 46-1131.

**46-1106. Concurrent jurisdiction of civil courts, military commissions, boards, or other military tribunals.** — The provisions of this act conferring jurisdiction upon courts-martial shall neither bar nor be construed as depriving civil courts, military commissions, boards, other military tribunals or other administrative actions, civil or military, of concurrent jurisdiction. [I.C., § 46-1107, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 4, p. 190; am. and redesisg. 1998, ch. 176, § 5, p. 624.]

**Compiler's notes.** For words "this act" see compiler's note, § 46-1101.

Former § 46-1106 was amended and redesignated as § 46-1105 by S.L. 1998, ch. 176, § 4.

This section was formerly compiled as § 46-1107.

Section 3 of S.L. 1984, ch. 92 is compiled as § 46-1105.

**46-1107. Commanding officer's nonjudicial punishment.** — (1) Any commanding officer, not necessarily the accused's immediate commanding officer, may, in addition to or in lieu of admonition or reprimand, impose one (1) or more of the following disciplinary punishments for minor offenses punishable under this chapter, without the intervention of a

court-martial. However, except in the case of a member attached to or embarked on a vessel, punishment may not be imposed upon any member under this chapter if the member has, before the imposition of punishment, demanded trial by court-martial in lieu of the punishment.

(a) Upon officers of his command:

(i) Restriction to certain specified limits, with or without suspension from duty, for not more than seven (7) consecutive duty days during any period or periods of duty;

(ii) If imposed by a general officer:

1. Restriction to quarters for not more than seven (7) consecutive duty days during any period or periods of duty;

2. Restriction to certain specified limits, with or without suspension from duty, for not more than fourteen (14) duty days during any period or periods of duty;

3. Fine, not to exceed two hundred dollars (\$200).

(b) Upon other personnel of his command:

(i) Reduction to the next inferior grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(ii) Extra duties, including fatigue or other duties for not more than seven (7) consecutive duty days during any period or periods of duty;

(iii) Restriction to certain specified limits, with or without suspension from duty for not more than seven (7) consecutive duty days during any period or periods of duty;

(iv) Fine, not to exceed seventy-five dollars (\$75.00);

(v) If imposed by a commander of the rank of major or above:

1. Reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction, but an enlisted member above the grade of E-4 may not be reduced more than two (2) grades;

2. Extra duties, including fatigue or other duties, for not more than fourteen (14) consecutive duty days during any period or periods of duty;

3. Restriction to certain specified limits, with or without suspension from duty, for not more than fourteen (14) consecutive duty days during any period or periods of duty;

4. Fine, not to exceed one hundred dollars (\$100).

No two (2) or more of the punishments of extra duties and restrictions may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment so that the total period for both punishments will not exceed the maximum imposable for either punishment.

(2) The member shall be given written notification of a commander's intention to impose punishment under this section and an opportunity to make a personal presentation to the commander proposing to impose the punishment prior to imposition of punishment and of his right to appeal within two (2) duty days to the next higher authority.



(3) The officer who imposes the punishment authorized in subsection (1) of this section, or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade imposed under subsection (1) of this section, whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights and privileges affected. When mitigating extra duties to restriction, the mitigated punishment shall not be for a greater period than the punishment originally imposed.

(4) A person punished under this section who considers his punishment unjust or disproportionate to the offense may appeal to the next higher authority by delivering written notice of the appeal within two (2) duty days after receipt of written notification of the punishment. The appeal shall be promptly decided, but the person punished shall not in the meantime be required to undergo the punishment adjudged. The higher authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (3) of this section by the officer who imposed the punishment.

(5) The imposition and enforcement of disciplinary punishment under this section for any act or omission shall not be a bar to trial by court-martial for a serious offense growing out of the same act or omission, and not properly punishable under this section, but shall be considered in imposing any sentence for a court-martial conviction arising out of the same act or omission.

(6) All records of nonjudicial punishment under this section shall be destroyed upon the termination of the person's current period of enlistment or after two (2) years of honorable service in the military without further disciplinary action under this section or a conviction by court-martial, whichever occurs first.

(7) The term "minor offenses," as used in this section, means any acts or omissions constituting offenses under the punitive sections of this chapter, unless deemed to be a serious offense by the convening authority. [I.C., § 46-1108, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 5, p. 190; am. and redesisg. 1998, ch. 176, § 6, p. 624; am. 2001, ch. 153, § 1, p. 553.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1107 was amended and redesignated as § 46-1106 by S.L. 1998, ch. 176, § 5.

This section was formerly compiled as § 46-1108.

Section 6 of S.L. 1984, ch. 92 is compiled as § 46-1110.

**Sec. to sec. ref.** This section is referred to in §§ 46-1108, 46-1131.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 257-259, 327-331.

**46-1108. Arrest.** — Arrest of members of the Idaho military not in federal service by members of the Idaho military while acting in their military capacity is prohibited, except in the following circumstances:

(1) If any member fails or refuses to report to his appointed place of duty, his commanding officer is authorized to arrest or cause to be arrested such

member and have him brought before the commanding officer at his unit or organization headquarters, whether such headquarters be located within or without the borders of the state. After such an arrest, the commanding officer is authorized to transport, or cause to be transported, such member to his appointed place of duty, whether within or without the borders of the state. Furthermore, if a commander finds that probable cause exists to believe that a minor offense has been committed by a member of his command, he may cause the member to be arrested and brought before him for the purpose of processing nonjudicial punishment under section 46-1107, Idaho Code. If military personnel are not available for the purpose of making the arrest or if the officer ordering the arrest deems it advisable, he may issue a warrant to any sheriff or peace officer authorized to serve warrants of arrest, and such sheriff or peace officer shall serve such warrants of arrest immediately, whenever practicable, and make return thereof to the commanding officer issuing the warrant.

(2) If any member of the Idaho military has had charges preferred against him under this chapter, and the convening authority to whom the charges have been forwarded has found that probable cause exists that the offense was committed by the accused and that the incarceration of the accused pending court-martial is required because of special circumstances found to exist which warrant such incarceration, then the convening authority is authorized to arrest such member or cause him to be arrested and have him confined pending trial. If military personnel are not available for the purpose of making the arrest, or if the convening authority deems it advisable, he may issue a warrant to any sheriff or peace officer authorized to serve such warrant in the same manner as other warrants of arrest, and said sheriff or peace officer shall effect the arrest and hold the accused in the county jail of the county in which the arrest is effected. Furthermore, if a commander finds that probable cause exists that a minor offense has been committed by a member of his command, he may cause the member to be arrested and brought before him for the purpose of processing nonjudicial punishment under section 46-1107, Idaho Code. If military personnel are not available for the purpose of making the arrest, or if the convening authority deems it advisable, he may issue a warrant to any sheriff or peace officer authorized to serve such warrant in the same manner as other warrants of arrest, and said sheriff or peace officer shall effect the arrest and hold the accused in the county jail of the county in which the arrest is effected. The arresting officer shall return said warrant to the convening authority and notify him of the arrest and the location of the arrestee so that the convening authority may further process the charges against the accused. Upon receipt of the notification of arrest, the commanding officer shall direct that the arrestee be retrieved and brought before him within twenty-four (24) hours.

(3) If any member of the Idaho military is accused of an offense against a civil authority, any other member of the Idaho military may, on request by a civil authority, arrest such accused member, but in such case, immediate steps must be taken to deliver such member forthwith to the appropriate



civil authorities. [I.C., § 46-1109, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 7, p. 624; am. 1999, ch. 110, § 1, p. 338; am. 2001, ch. 153, § 2, p. 553.]

**Compiler's notes.** Former § 46-1108 was amended and redesignated as § 46-1107 by S.L. 1998, ch. 176, § 6.

This section was formerly compiled as § 46-1109.

Section 3 of S.L. 2001, ch. 153, is compiled as § 46-1124.

**Cross ref.** Immunity from arrest, § 46-401.

**46-1109. Types of courts-martial.** — In the Idaho military not in federal service, there shall be two (2) types of courts-martial:

(1) General courts-martial, consisting of:

(a) A military judge and not fewer than five (5) members; or

(b) Only a military judge if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge;

(2) Special courts-martial consisting of:

(a) A military judge and not fewer than three (3) members; or

(b) Only a military judge if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge. [I.C., § 46-1110, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 6, p. 190; am. and redesign. 1998, ch. 176, § 8, p. 624.]

**Compiler's notes.** Former § 46-1109 was amended and redesignated as § 46-1108 by S.L. 1998, ch. 176, § 7.

This section was formerly compiled as § 46-1110.

Section 5 of S.L. 1984, ch. 92 is compiled as § 46-1108.

**46-1110. Jurisdiction of general courts-martial.** — Each command of the Idaho military has court-martial jurisdiction over all persons subject to this code.

General courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code and may adjudge any of the following punishments:

(1) Reprimand;

(2) Fine of not more than two hundred dollars (\$200);

(3) Forfeiture of all pay and allowances;

(4) Dismissal, bad conduct discharge, or dishonorable discharge;

(5) Reduction in rank of an enlisted member to the lowest enlisted grade;

or

(6) Confinement in lieu of fine of not more than [than] one hundred (100) days; or

(7) Any combination of the above. [I.C., § 46-1111, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 7, p. 190; am. and redesign. 1998, ch. 176, § 9, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1110 was amended and redesignated as § 46-1109 by S.L. 1998, ch. 176, § 8.

The bracketed word "than" was inserted by the compiler.

This section was formerly compiled as § 46-1111.

**Cross ref.** Additional jurisdiction, national guard or organized militia on active duty, § 46-603.

Jurisdiction presumed, § 46-803.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 276-295.

**46-1111. Jurisdiction of special courts-martial.** — Special courts-martial have jurisdiction to try persons subject to this code, other than commissioned or warrant officers, for any offense for which they may be punished under this code and may adjudge any of the following punishments:

- (1) Reprimand;
- (2) Fine of not more than one hundred dollars (\$100);
- (3) Forfeiture of all pay and allowances;
- (4) Reduction in rank of an enlisted man by not more than two (2) grades;
- (5) Bad conduct discharge;
- (6) Confinement in lieu of fine of not more than one hundred (100) days;

or

(7) Any combination of the above. [I.C., § 46-1112, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 8, p. 190; am. and redesign. 1998, ch. 176, § 10, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1111 was amended and redesignated as § 46-1110 by S.L. 1998, ch. 176, § 9.

This section was formerly compiled as § 46-1112.

**Collateral References.** 6 C.J.S., Armed Services, § 169.

**46-1112. Convening of general and special courts-martial.** —

(1) In the Idaho military not in federal service, general courts-martial may be convened by the governor. The governor may, after convening a general court-martial, delegate to the adjutant general authority to take any or all further actions which the convening authority can take under this code.

(2) In the Idaho military not in federal service, special courts-martial may be convened by the commanding officer of a garrison, fort, post, camp, air base, auxiliary air base, or other place where Idaho military troops are on duty, or of a brigade, regiment, wing, group, detached battalion, separate squadron or equivalent detached command, or any superior authority. [I.C., § 46-1113, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 9, p. 190; am. and redesign. 1998, ch. 176, § 11, p. 624.]

**Compiler's notes.** The word "code" referred to in the second sentence of the first paragraph is defined in § 46-1102.

Former § 46-1112 was amended and redesignated as § 46-1111 by S.L. 1998, ch. 176, § 10.

This section was formerly compiled as § 46-1113.

**Collateral References.** 6 C.J.S., Armed Services, §§ 167, 169.



**46-1113. Composition of courts-martial.** — (1) Any commissioned officer in the Idaho military is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(2) Any warrant officer in the Idaho military is eligible to serve on courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(3)(a) Any enlisted member who is not a member of the same unit as the accused is eligible to serve on courts-martial for the trial of any enlisted member who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third ( $\frac{1}{3}$ ) of the total membership of the court.

(b) In this section, the word "unit" means any regularly organized body not larger than a company or equivalent size organization.

(4)(a) When it can be avoided, no person may be tried by a court-martial any member of which is junior to him in rank or grade.

(b) When convening a court-martial, the convening authority shall detail as members thereof such members of the Idaho military who are of the same service and component as the accused, e.g., Idaho army national guard, as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No person is eligible to serve as a member of a court-martial when he is the accuser or a witness or has acted as investigating officer or as counsel in the same case. [I.C., § 46-1114, as added by 1984, ch. 92, § 11, p. 190; am. and redesi. 1998, ch. 176, § 12, p. 624.]

**Compiler's notes.** Former § 46-1113 was amended and redesignated as § 46-1112 by S.L. 1998, ch. 176, § 11.

This section was formerly compiled as § 46-1114.

Former § 46-1114, which comprised I.C.,

§ 46-1114 as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 10.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 266-275.

6 C.J.S., Armed Services, § 168.

**46-1114. Military judges.** — (1) The authority convening a general or special court-martial shall detail a military judge to preside over each open session of the court-martial. The military judge shall:

(a) Rule finally on all matters of law;

(b) Rule finally on all motions; and

(c) Except as otherwise provided, decide all other questions raised at the trial of the accused.

(2) A military judge shall be:

(a) A commissioned officer who is a member of the bar of this state or a member of the bar of a federal court, and who is or has been certified or recognized as a military judge by any branch of the armed forces and appointed to those duties by the adjutant general, to be compensated at the equivalent rate for his military grade from the general fund; or

(b) Any magistrate or district court judge of the state of Idaho, currently sitting or retired, who is a member of the bar of this state and who has been appointed to act as a military judge in Idaho by the Idaho supreme court upon the written request of the adjutant general, to be compensated in an amount determined by the Idaho supreme court from the general fund.

(3) No person is eligible to act as a military judge in a case if he is the accuser, a witness, a counsel, or has acted as investigating officer in the same case. [I.C., § 46-1115, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 12, p. 190; am. and redesisg. 1998, ch. 176, § 13, p. 624.]

**Compiler's notes.** Former § 46-1114 was amended and redesignated as § 46-1113 by S.L. 1998, ch. 176, § 12.

This section was formerly compiled as § 46-1115.

**Sec. to sec. ref.** This section is referred to in § 46-1102.

**Collateral References.** 53A Am. Jur. 2d, Military, and Civil Defense, §§ 267, 296-326. 6 C.J.S., Armed Services, § 168.

**46-1115. Detail of trial counsel and defense counsel.** — (1) For each general and special court-martial the convening authority shall detail trial counsel and defense counsel and such assistants as he considers appropriate. No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel or assistant trial counsel in the same case. No person who has acted for the prosecution may later act in the same case for the defense or vice versa.

(2) Trial counsel and defense counsel detailed for a court-martial must be:

(a) Members of the bar of this state; and

(b) Certified as competent to perform such duties by the convening authority's staff judge advocate or legal counsel. [I.C., § 46-1116, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 13, p. 190; am. and redesisg. 1998, ch. 176, § 14, p. 624.]

**Compiler's notes.** Former § 46-1115 was amended and redesignated as § 46-1114 by S.L. 1998, ch. 176, § 13.

This section was formerly compiled as § 46-1116.

**Sec. to sec. ref.** This section is referred to in § 46-1126.

**46-1116. Detail or employment of reporters and interpreters.** — The convening authority of a court-martial shall detail or employ a reporter who shall record the proceedings of the court. The convening authority of a military court may, if he deems it necessary, detail or employ interpreters who shall interpret for the court. [I.C., § 46-1117, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 14, p. 190; am. and redesisg. 1998, ch. 176, § 15, p. 624.]

**Compiler's notes.** Former § 46-1116 was amended and redesignated as § 46-1115 by S.L. 1998, ch. 176, § 14.

This section was formerly compiled as § 46-1117.

**46-1117. Absent and additional members.** — (1) No member of a court-martial shall be absent or excused after the court has been assembled



for the trial of the accused except for a physical disability, as a result of a challenge, or by order of the convening authority for a good cause.

(2) A general court-martial shall be composed of at least five (5) members and at least one (1) alternate member.

(3) A special court-martial shall be composed of at least three (3) members and at least one (1) alternate member.

(4) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence had previously been introduced or a stipulation to its use is read in court in the presence of the new military judge, the accused, and counsel for both sides, and such is consented to by the accused and both trial and defense counsel. If not consented to, the convening authority may order a new trial. [I.C., § 46-1118, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 15, p. 190; am. and redesign. 1998, ch. 176, § 16, p. 624.]

**Compiler's notes.** Former § 46-1117 was amended and redesignated as § 46-1116 by S.L. 1998, ch. 176, § 15.

This section was formerly compiled as § 46-1118.

**46-1118. Preferral of charges.** — (1) Any person subject to this code may prefer charges, even if he is under charges, in arrest, or in confinement.

(2) A person subject to this code cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility.

(3) A person preferring charges shall sign such charges under oath before a commissioned officer or before any person authorized under the laws of the state of Idaho to administer oaths, and shall state:

(a) That the signer has personal knowledge of or has investigated the matters set forth therein; and

(b) That they are true in fact to the best of his knowledge and belief.

(4) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as possible. [I.C., § 46-1119, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 16, p. 190; am. and redesign. 1998, ch. 176, § 17, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1118 was amended and redesignated as § 46-1117 by S.L. 1998, ch. 176, § 16.

This section was formerly compiled as § 46-1119.

**Sec. to sec. ref.** This section is referred to in §§ 46-1104 and 46-1138.

**Collateral References.** 6 C.J.S., Armed Services, § 164.

**46-1119. Compulsory self-incrimination prohibited.** — (1) No person subject to this code may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(2) No person subject to this code may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial, that he has a right to consult with a lawyer, that he has a right to have a lawyer present during questioning, that he has a right to request a lawyer and that upon his request one will be provided him without cost or, if he prefers, that he may retain counsel of his choice at his own expense.

(3) No person subject to this code may compel any person to make a statement or produce evidence before any court-martial if the statement or evidence is not material to the issue and may tend to incriminate him.

(4) No statement obtained from any person in violation of this section, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

(5) The requirements of this section are binding on all persons administering this code, but failure to follow them does not divest a military court of jurisdiction. [I.C., § 46-1120, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 17, p. 190; am. and redesiɡ. 1998, ch. 176, § 18, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

This section was formerly compiled as § 46-1120.

Former § 46-1119 was amended and redesignated as § 46-1118 by S.L. 1998, ch. 176, § 17.

**46-1120. Investigation.** — (1) No charge or specification shall be referred to any court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. The convening authority will appoint an investigating officer. The investigating officer shall ascertain and impartially weigh all available facts in arriving at his conclusions. The investigating officer will submit a formal report to the convening authority's staff judge advocate or legal counsel. This report will include, but need not be limited to, the following:

(a) A statement of the name, organization or address of counsel, and information as to the presence or absence of counsel throughout the proceedings in all cases in which counsel has been requested by the accused.

(b) A statement of the substance of the testimony taken on both sides, including any stipulated facts, a copy of which shall be provided to the accused.

(c) Any other statements, documents, or matters considered by him in reaching his conclusions or making his recommendations, or recitals of the substance or nature of these items.

(d) A statement of any reasonable ground for the belief that the accused is, or was at the time of an offense, mentally defective, deranged, or abnormal.



(e) A statement as to whether essential witnesses will be available in the event of trial. If essential witnesses will not be available, the reasons for nonavailability will be stated.

(2) The reviewing staff judge advocate or legal counsel will review the report for legal sufficiency and forward the report with his recommendations to the convening authority.

(3) At the outset of the investigation, the accused will be informed of the following:

(a) The offense charged against him;

(b) The name of the accuser and of the witnesses against him as far as are then known by the investigating officer;

(c) The fact that charges are about to be investigated;

(d) His right to counsel to represent him at the investigation, if he so desires, including the several alternatives available to him as set forth in section 46-1126, Idaho Code;

(e) His right to have the investigating officer examine available witnesses requested by him;

(f) His right to make a statement in any form, and further that, if he elects to make a statement in any form, it may be used against him in a court-martial.

(4) Unless he expressly and voluntarily states that he does not desire counsel and that he is willing to make a statement, he will not be interrogated until counsel is present. If, during questioning, the accused declines to make any further statement or requests to consult with counsel before answering further questions, then questioning shall cease.

(5) The requirements of this section are binding on all persons administering this code, but failure to follow them does not divest a military court of jurisdiction. [I.C., § 46-1121, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 18, p. 190; am. and redesign. 1998, ch. 176, § 19, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1120 was amended and redesignated as § 46-1119 by S.L. 1998, ch. 176, § 18.

This section was formerly compiled as § 46-1121.

**Sec. to sec. ref.** This section is referred to in §§ 46-1122, 46-1134.

**Collateral References.** 6 C.J.S., Armed Services, §§ 163, 165.

**46-1121. Forwarding of charges for general court-martial. —** When a person is held for a trial by general court-martial, the commanding officer shall, within a reasonable time, forward the charges together with the investigation report to the convening authority. [I.C., § 46-1122, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 19, p. 190; am. and redesign. 1998, ch. 176, § 20, p. 624.]

**Compiler's notes.** Former § 46-1121 was amended and redesignated as § 46-1120 by S.L. 1998, ch. 176, § 19.

This section was formerly compiled as § 46-1122.

**46-1122. Reference for trial — Changing the charge to conform to evidence or correct defects. —** (1) The convening authority may not

refer any charge to a court-martial for trial unless an investigating officer properly appointed pursuant to section 46-1120, Idaho Code, has found that the charge alleges an offense under this code and is warranted by evidence indicated in the report of the investigation.

(2) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections and changes in the charges and specifications needed to make them conform to the evidence may be made. [I.C., § 46-1123, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 20, p. 190; am. and redesisg. 1998, ch. 176, § 21, p. 624.]

**Compiler's notes.** As enacted the heading of this section read, "Advice of state judge advocate and reference for trial."

The words "this code" are defined in § 46-1102.

Former § 46-1122 was amended and redesignated as § 46-1121 by S.L. 1998, ch. 176, § 20.

This section was formerly compiled as § 46-1123.

**46-1123. Service of charges.** — The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had at least thirty (30) days prior to trial. [I.C., § 46-1124, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 21, p. 190; am. and redesisg. 1998, ch. 176, § 22, p. 624.]

**Compiler's notes.** Former § 46-1123 was amended and redesignated as § 46-1122 by S.L. 1998, ch. 176, § 21.

This section was formerly compiled as § 46-1124.

**Sec. to sec. ref.** This section is referred to in §§ 46-1104 and 46-1105.

**46-1124. Rules of procedure and evidence.** — Enforcement of the Idaho code of military justice shall conform as nearly as practicable to the rules of courts-martial, military rules of evidence, and case precedent of the armed forces of the United States, except where in conflict with other provisions of this chapter. [I.C., § 46-1125, as added by 1984, ch. 92, § 23, p. 190; am. and redesisg. 1998, ch. 176, § 23, p. 624; am. 2001, ch. 153, § 3, p. 553.]

**Compiler's notes.** Former § 46-1125, which comprised I.C., § 46-1125 as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 22.

The words "this code" are defined in § 46-1102.

Former § 46-1124 was amended and redesignated as § 46-1123 by S.L. 1998, ch. 176, § 22.

This section was formerly compiled as § 46-1125.

Section 2 of S.L. 2001, ch. 153, is compiled as § 46-1108.

**Cross ref.** Rules of evidence in criminal actions, § 19-2110.

**46-1125. Unlawfully influencing action of court.** — (1) No person subject to this code may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or his functions in the conduct of the proceeding.



(2) No person subject to this code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any member thereof in reaching the findings or sentence on any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

(3) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the military is qualified to be advanced in grade, or in determining the assignment or transfer of a member or in determining whether a member should be retained, no person subject to this code may, in preparing such report: (a) consider or evaluate performance of duty of any member as a member of a court-martial; or (b) give a less favorable rating or evaluation of any member because of the zeal with which such member, as counsel, represented any accused before a court-martial. This section shall not apply to evaluations made by any staff judge advocate on the performance of his personnel. [I.C., § 46-1126, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 24, p. 190; am. and redesign. 1998, ch. 176, § 24, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1125 was amended and redesignated as § 46-1124 by S.L. 1998, ch. 176, § 23.

This section was formerly compiled as § 46-1126.

**46-1126. Duties of trial counsel and defense counsel.** — (1) The trial counsel of a court-martial shall prosecute in the name of the state, and shall, under the direction of the court, prepare the record of the proceedings.

(2) The accused has the right to be represented in his defense before a court-martial by civilian counsel if provided by him at his own expense or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under section 46-1115, Idaho Code. Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused. [I.C., § 46-1127, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 25, p. 190; am. and redesign. 1998, ch. 176, § 25, p. 624.]

**Compiler's notes.** Former § 46-1126 was amended and redesignated as § 46-1125 by S.L. 1998, ch. 176, § 24.

This section was formerly compiled as § 46-1127.

**Sec. to sec. ref.** This section is referred to in § 46-1120.

**46-1127. Sessions.** — (1) At any time after the service of charges which have been referred for trial to a court-martial, the military judge may call the court into session without the presence of the members for the following purposes:

(a) Hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

- (b) Hearing and ruling upon any matter which may be ruled upon by the military judge under this code, whether or not the matter is appropriate for later consideration or decision by the members of the court;
- (c) Holding the arraignment and receiving the pleas of the accused;
- (d) Performing any other procedural function which may be performed by the military judge under this code or under rules prescribed by the adjutant general and which does not require the presence of the members of the court.

(2) The proceedings described in subsection (1) of this section shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, and shall be made a part of the record.

(3) When the members of a court-martial deliberate or vote, only the members may be present. [I.C., § 46-1128, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 26, p. 190; am. and redesisg. 1998, ch. 176, § 26, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

This section was formerly compiled as § 46-1128.

Former § 46-1127 was amended and redesignated as § 46-1126 by S.L. 1998, ch. 176, § 25.

**46-1128. Continuances.** — The military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just. [I.C., § 46-1129, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 27, p. 190; am. and redesisg. 1998, ch. 176, § 27, p. 624.]

**Compiler's notes.** Former § 46-1128 was amended and redesignated as § 46-1127 by S.L. 1998, ch. 176, § 26.

This section was formerly compiled as § 46-1129.

**46-1129. Challenges.** — (1) The military judge and members of a court-martial may be challenged by the accused or trial counsel for cause stated to the court. The military judge shall determine the relevancy and validity of challenges for cause. Challenges by trial counsel shall be presented and decided before those by the accused are offered.

(2) Each accused is entitled to one (1) peremptory challenge and the trial counsel is entitled to one (1) peremptory challenge per defendant of court members in a court-martial, but the military judge may not be challenged except for cause. [I.C., § 46-1130, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 28, p. 190; am. and redesisg. 1998, ch. 176, § 28, p. 624.]

**Compiler's notes.** Former § 46-1129 was amended and redesignated as § 46-1128 by S.L. 1998, ch. 176, § 27.

This section was formerly compiled as § 46-1130.

**46-1130. Oaths.** — (1) Before performing their respective duties, military judges, interpreters, members of courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, and reporters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully.



(2) All witnesses before military courts shall be examined on oath or affirmation. [I.C., § 46-1131, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 29, p. 190; am. and redesign. 1998, ch. 176, § 29, p. 624.]

**Compiler's notes.** Former § 46-1130 was amended and redesignated as § 46-1129 by S.L. 1998, ch. 176, § 28.

This section was formerly compiled as § 46-1131.

**46-1131. Statute of limitations.** — (1) A person charged with desertion, absent without leave during time of war or during an emergency declared by the governor, aiding the enemy, mutiny, or fraudulent discharge, may be tried and punished at any time without limitation.

(2) A person charged with any other offense under this code is not liable to be tried by court-martial if the offense was committed more than three (3) years before the receipt of sworn charges and specifications by an officer exercising court-martial jurisdiction over the command.

(3) A person may not be punished under section 46-1107, Idaho Code, if the offense was committed more than two (2) years before the imposition of punishment under section 46-1107, Idaho Code.

(4) If a person is convicted of fraudulent discharge, the individual may be tried at court-martial for all prior offenses committed under this code and the statute of limitations for those offenses shall be tolled for the period between the date of the fraudulent discharge and date of conviction for fraudulent discharge.

(5) The statute of limitation set forth above, shall also be tolled under the following circumstances:

(a) Periods in which the accused was absent from the state of Idaho, or in the custody of civil authorities, or in the hands of the enemy;

(b) For an offense which is certified by the adjutant general to be detrimental to the prosecution of war or inimical to state or national security, the period of limitation prescribed in this section is extended to six (6) months after the termination of any hostilities proclaimed by the president or by a joint resolution of congress;

(c) The statute of limitations applicable to any offense under this chapter:

(i) Involving fraud or attempted fraud against the state of Idaho or any agency thereof in any manner, whether by conspiracy or not;

(ii) Committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the state of Idaho or the United States; or

(iii) Committed in connection with the negotiation, procurement, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of war, or any disposition of termination inventory by a defense contractor or governmental agencies;

is tolled until three (3) years after the termination of hostilities proclaimed by the president or by a joint resolution of congress. [I.C.,

§ 46-1132, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 30, p. 190; am. and redesisg. 1998, ch. 176, § 30, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1131 was amended and redesignated as § 46-1130 by S.L. 1998, ch. 176, § 29.

This section was formerly compiled as § 46-1132.

**Cross ref.** Fraudulent enlistment, appointment, separation, § 46-1155.

Desertion, § 46-1168.

**Sec. to sec. ref.** This section is referred to in § 46-1104.

**46-1132. Former jeopardy.** — (1) No person may be tried a second time in a court-martial for the same offense.

(2) No person may be tried by court-martial for any offense if he has been tried for substantially the same offense in any state court or in any United States court.

(3) No proceeding in which an accused has been found guilty by a court-martial upon any charge is a trial in the sense of this article until the finding of guilty has become final after review of the case and all available appeals have been fully completed. [I.C., § 46-1133, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 31, p. 190; am. and redesisg. 1998, ch. 176, § 31, p. 624.]

**Compiler's notes.** Former § 46-1132 was amended and redesignated as § 46-1131 by S.L. 1998, ch. 176, § 30.

This section was formerly compiled as § 46-1133.

**Collateral References.** 6 C.J.S., Armed Services, § 175.

Double jeopardy considerations in federal criminal cases — Supreme Court cases. 162 A.L.R. Fed. 415.

**46-1133. Pleas of accused.** — (1) If an accused arraigned before a court-martial makes an irregular plea, or after a plea of guilty sets up matter inconsistent with his plea, or if it appears that he has entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pled not guilty.

(2) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification shall be entered immediately. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn and such withdrawal is permitted by the military judge prior to announcement of the sentence, in which event the proceeding shall continue as though the accused had pled not guilty. [I.C., § 46-1134, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 32, p. 190; am. and redesisg. 1998, ch. 176, § 32, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1133 was amended and redesignated as § 46-1132 by S.L. 1998, ch. 176, § 31.

This section was formerly compiled as § 46-1134.



**46-1134. Discovery.** — Pretrial discovery for any court-martial shall be in accordance with the procedures for discovery set out in the manual for courts-martial and this section.

(1) At any session convened pursuant to section 46-1127, Idaho Code, and for good cause shown at trial, the military judge shall, upon a motion of the accused, order the trial counsel to divulge to the accused, and, where necessary, permit the accused to inspect, copy or photograph:

(a) Any statement made by the accused relevant to the offense charged which is in the possession, custody or control of the state, the existence of which is known or may become known to the trial counsel by the exercise of due diligence;

(b) Written or recorded statements, or the substance of an oral statement made by a coaccused;

(c) The prior military record, as is then available to the trial counsel, of the accused or of any coaccused;

(d) The names and current addresses, if known, together with any relevant prior statement of all persons, civilian or military, whom the trial counsel intends to call as witnesses at trial;

(e) The report of any nonjudicial or quasi-judicial investigation conducted by the state relevant to the offense charged unless the military judge finds, on good cause shown, that the disclosure would be inimical to the state or national security;

(f) The results and reports of any physical or mental examinations, or of scientific tests or experiments, made in connection with the case, within the possession, custody, or control of the trial counsel, the existence of which is known to the trial counsel, or which may become known by the exercise of due diligence; and

(g) The report of the investigating officer made pursuant to section 46-1120, Idaho Code.

(2) At any session convened pursuant to section 46-1127, Idaho Code, and, for good cause shown at trial, the military judge may, upon a motion of the accused, order the trial counsel to permit the accused to inspect, copy, or photograph books, papers, documents, tangible objects, buildings, or places or copies or portions thereof, which are within the possession, custody, or control of the state, upon a showing that they are material to the preparation of the defense and that the request is reasonable. If the relief requested hereunder is granted, the military judge may, upon motion of the trial counsel, inspect, copy, or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof which the accused intends to introduce into evidence at trial, which are related to the discovery sought by the accused and which are within the possession, custody, or control of the defense upon a showing that they are material to the preparation of the state's case and that the request is reasonable.

(3) Notwithstanding any other provisions of this section, the trial counsel shall disclose to the accused, as soon as it is discovered, all material, exculpatory evidence actually known to the trial counsel, whether or not a request for such evidence has been made by the accused.

(4) Except as provided in subsections (1) and (3) of this section, discovery or inspection is not authorized of reports, memoranda or other internal

documents made by state agents in connection with the investigation or prosecution of the case, or to statements made by state witnesses or prospective state witnesses to agents of the state except as provided in 18 USC sec. 3500.

(5) The military judge in granting relief under this article, shall, if necessary, specify the time, place, and manner of making the discovery and inspection permitted, under such terms and conditions as are just.

(6) Whenever discovery is ordered or required under this article, a continuing duty to disclose exists, and whenever a party discovers additional material previously requested or ordered which is subject to discovery or inspection, he shall promptly notify the other party or his counsel and the military judge of the existence of such additional material. In the event that either party fails to comply with this article or with an order issued pursuant to this article, the military judge may grant a continuance or prohibit the party from introducing into evidence the material not disclosed or it may enter such other order, including dismissal of all charges, as it deems just under the circumstances.

(7) Upon a sufficient showing by either party the military judge may at any time order that discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. [I.C., § 46-1135, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 33, p. 190; am. and redesign. 1998, ch. 176, § 33, p. 624.]

**Compiler's notes.** Former § 46-1134 was amended and redesignated as § 46-1133 by S.L. 1998, ch. 176, § 32.

This section was formerly compiled as § 46-1135.

#### **46-1135. Opportunity to obtain witnesses and other evidence. —**

(1) Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be the same as that which the courts of this state having criminal jurisdiction may lawfully issue and shall apply to any part of the state and to any other state in which the court-martial may be sitting.

(2)(a) The authority to issue orders to conduct searches and seizures of persons and property subject to the provisions of this chapter in connection with any offense prohibited by this code may be exercised by a military judge or by a judge or magistrate of a district court of this state.

(b) No search or seizure of persons or property shall be ordered except in writing upon probable cause supported by written affidavits and particularly describing the person or place to be searched and the person or thing to be seized.

(c) Nothing in this code shall limit commanding officers in the exercise of their authority to conduct reasonable searches and seizures pursuant to law or military regulation, whether state or federal. [I.C., § 46-1136, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 34, p. 190; am. and redesign. 1998, ch. 176, § 34, p. 624.]



**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1135 was amended and redesignated as § 46-1134 by S.L. 1998, ch. 176, § 33.

This section was formerly compiled as § 46-1136.

**Cross ref.** Issuance of subpoenas for witnesses, § 19-807.

**Collateral References.** 6 C.J.S., Armed Services, § 160.

**46-1136. Process — Mandates — Subpoenas duces tecum — Attachment of witnesses and books and records — Form — Execution — Service without charge.** — (1) Military courts are empowered to issue all process and mandates necessary and proper to carry into full effect the powers vested in such courts. Such courts shall have power to issue subpoenas duces tecum and to enforce by attachment attendance of witnesses, the accused, and production of books and records.

(2) Such process and mandates may be issued by the military judge of a court-martial and may be directed to any military officer or peace officer as defined in the laws of this state.

(3) It shall be the duty of all officers to whom such process or mandates may be directed to execute the same and make return of their acts thereunder according to the requirements of the same.

(4) Any person not subject to this code who:

(a) Has been duly subpoenaed to appear as a witness before a court-martial or before any military or civil officer designated to take a deposition to be read in evidence before such a court or board;

(b) Has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the state of Idaho; and

(c) Willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;

commits an offense under this act and may be tried by complaint and information in an Idaho district court, jurisdiction hereby being conferred upon those courts for that purpose. Upon conviction, such a person shall be punished by a fine of not more than five hundred dollars (\$500), or imprisonment for not more than thirty (30) days, or both. The prosecuting attorney or the officer prosecuting for the state of Idaho in the district court shall, upon certification of the facts to him by the military judge, file an affidavit against and prosecute any person violating this section. [I.C., § 46-1137, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 35, p. 190; am. and redesign. 1998, ch. 176, § 35, p. 624.]

**Compiler's notes.** For words "this act" see compiler's note, § 46-1101.

Former § 46-1136 was amended and redesignated as § 46-1135 by S.L. 1998, ch. 176, § 34.

This section was formerly compiled as § 46-1137.

**Cross ref.** Attachment of witnesses in civil actions, § 9-709.

Compensation of witnesses in civil courts, § 9-1601.

Executions in civil actions, § 11-301.

**46-1137. Contempts.** — (1) A military judge may punish for contempt any person subject to this code who uses any disrespectful word, sign or

gesture in its presence, or who disturbs its proceedings by any riot or disorder.

(2) Any person not subject to this code who engages in conduct described in subsection (1) of this section, may be fined not more than five hundred dollars (\$500) or imprisoned not more than thirty (30) days, or both. Upon certification of the facts by the military court to the prosecuting attorney of the county where the offense occurred, the prosecuting attorney shall prosecute the accused in any court of record, jurisdiction hereby being conferred upon such courts for this purpose. [I.C., § 46-1140, as added by 1975, ch. 147, § 4, p. 339; am. and redesisg. 1984, ch. 92, § 36, p. 190; am. and redesisg. 1998, ch. 176, § 36, p. 624.]

**Compiler's notes.** This section, which was originally designated as § [46-1138] 46-1140 was amended in 1984 and redesignated as § 46-1138.

The words "this code" are defined in § 46-1102.

Former § 46-1137 was amended and redesignated as § 46-1136 by S.L. 1998, ch. 176, § 35.

This section was formerly compiled as § 46-1138.

**Collateral References.** 6 C.J.S., Armed Services, § 160.

Power of courts-martial to punish for contempt. 8 A.L.R. 1574; 54 A.L.R. 321.

**46-1138. Depositions.** — Depositions may be taken in accordance with the procedures set forth in the manual for courts-martial and this section.

(1) At any time after charges have been signed, as provided in section 46-1118, Idaho Code, any party may take oral or written depositions unless the military judge or, if a military judge has not yet been appointed, the convening authority forbids it for good cause. If a deposition is to be taken before charges are referred for trial, the convening authority shall designate trial and defense counsel for the purpose of taking the deposition of any witness.

(2) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(3) Depositions shall be taken before and authenticated by any military or civil officer authorized by the laws of the state or by the laws of the place where the deposition is taken or by federal law to administer oaths.

(4) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read into evidence before any court-martial, if it appears:

(a) That the witness resides or is beyond the state in which the court-martial is ordered to sit, or beyond the distance of one hundred (100) miles from the place of trial or hearing.

(b) That the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(c) That the present whereabouts of the witness is unknown. [I.C., § 46-1139, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 37, p. 190; am. and redesisg. 1998, ch. 176, § 37, p. 624.]



**Compiler's notes.** Former § 46-1138 was amended and redesignated as § 46-1137 by S.L. 1998, ch. 176, § 36.

This section was formerly compiled as § 46-1139.

Section 38 of S.L. 1984, ch. 92 contained a repeal; § 39 is compiled as § 46-1141.

**46-1139. Voting and rulings.** — (1) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall, in each case, count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(2) The military judge shall rule upon all questions of law and all interlocutory questions. Such ruling made by the military judge upon any question of law or any interlocutory question, other than the factual issue of mental responsibility of the accused, is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial.

(3) Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court:

(a) That the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

(b) That in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused, and he must be acquitted; and

(c) That the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the state.

(4) Subsections (1), (2), and (3) of this section do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and in addition shall, on request, find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein. [I.C., § 46-1141, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 39, p. 190; am. and redesign. 1998, ch. 176, § 38, p. 624.]

**Compiler's notes.** Former § 46-1139 was amended and redesignated as § 46-1138 by S.L. 1998, ch. 176, § 37.

This section was formerly compiled as § 46-1141.

Section 37 of S.L. 1984, ch. 92 is compiled as § 46-1139 and § 38 contained a repeal.

**Collateral References.** 6 C.J.S., Armed Services, § 181.

**46-1140. Number of votes required.** — (1) No person shall be convicted of any offense, except by the concurrence of at least three-fourths (¾) of the members.

(2) All sentences shall be determined by the concurrence of at least three-fourths (¾) of the members. [I.C., § 46-1142, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 40, p. 190; am. and redesign. 1998, ch. 176, § 39, p. 624.]

**Compiler's notes.** A former § 46-1140, which comprised I.C., § 46-1140 as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 38.

This section was formerly compiled as § 46-1142.

Section 41 of S.L. 1984, ch. 92 is compiled as § 46-1144.

**46-1141. Court to announce action.** — A court-martial shall announce its findings and sentence to the parties as soon as determined. [I.C., § 46-1143, as added by 1975, ch. 147, § 4, p. 339; am. and redesisg. 1998, ch. 176, § 40, p. 624.]

**Compiler's notes.** Former § 46-1141 was amended and redesignated as § 46-1139 by S.L. 1998, ch. 176, § 38.

This section was formerly compiled as § 46-1143.

**46-1142. Record of trial.** — (1) A court-martial shall keep a record, by summarized or verbatim transcript, as may be ordered by the convening authority, of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence.

(2) A copy of the record of the proceedings of a court-martial shall be given to the accused as soon as it is authenticated. The record shall be deemed settled when authenticated, absent objection made within twenty-one (21) days of receipt of the authenticated record by the accused. [I.C., § 46-1144, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 41, p. 190; am. and redesisg. 1998, ch. 176, § 41, p. 624.]

**Compiler's notes.** Former § 46-1142 was amended and redesignated as § 46-1140 by S.L. 1998, ch. 176, § 39.

Section 40 of S.L. 1984, ch. 92 is compiled as § 46-1142 (now 46-1140).

This section was formerly compiled as § 46-1144.

**46-1143. Dishonorable discharge, bad conduct discharge or dismissal — Procedure.** — (1) A dishonorable discharge, bad conduct discharge or dismissal may not be adjudged by any court-martial unless a complete verbatim record of the proceedings and testimony before the court has been made.

(2) A sentence of dishonorable discharge, bad conduct discharge or dismissal may not be executed until it is approved by the governor. [I.C., § 46-1145, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 42, p. 190; am. and redesisg. 1998, ch. 176, § 42, p. 624.]

**Compiler's notes.** Former § 46-1143 was amended and redesignated as § 46-1141 by S.L. 1998, ch. 176, § 40.

Section 43 of S.L. 1984, ch. 92 contained repeals; section 44 is compiled as § 46-1148.

This section was formerly compiled as § 46-1145.

**Collateral References.** 6 C.J.S., Armed Services, §§ 81, 84.

**46-1144. Effective date of sentences.** — Sentences of courts-martial



shall become effective on the date when all reviews provided by this code have been completed. If the sentence includes confinement, the member shall be remanded to the custody of the sheriff of the county wherein the member's military unit of assignment, or attachment, for duty, is located; when the sentence becomes effective, for service of the period of confinement to which the member has been sentenced. [I.C., § 46-1148, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 44, p. 190; am. and redesisg. 1998, ch. 176, § 43, p. 624.]

**Compiler's notes.** The words "this code" are defined in § 46-1102.

Former § 46-1144 was amended and redesignated as § 46-1142 by S.L. 1998, ch. 176, § 41.

This section was formerly compiled as § 46-1148.

Sections 43 and 45 of S.L. 1984, ch. 92 contained repeals; sections 42 and 46 are compiled as §§ 46-1145 and 46-1154.

#### **46-1145. Review of record by staff judge advocate — Appeal. —**

(1) The convening authority shall forward the record to his staff judge advocate for review.

(2) The staff judge advocate shall review the record of trial in every case forwarded to him for review as provided in this section.

(3) The staff judge advocate shall have authority to:

(a) Affirm only such findings of guilty, and the sentence or such part or amount of the sentence as he finds correct in law and fact and determines on the basis of the entire record should be approved;

(b) Order a rehearing if he sets aside the findings and sentence, except where the setting aside is based on lack of sufficient evidence to support the findings;

(c) Order that the charges be dismissed if he sets aside the findings and sentence based on lack of sufficient evidence to support the findings.

(4) Following completion of the staff judge advocate's review a copy will be provided to the defense and trial counsels and an aggrieved party may appeal to the district court of the judicial district wherein the court-martial was conducted within forty-two (42) days from the date of receipt of such review. Such appeal shall be conducted in accordance with the Idaho criminal rules governing appeals and this code. For courts-martial held outside the state of Idaho, venue for appeal purposes shall be in the district court of the fourth judicial district, Ada County, Idaho. [I.C., § 46-1154, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 46, p. 190; am. and redesisg. 1998, ch. 176, § 44, p. 624.]

**Compiler's notes.** Former § 46-1145 was amended and redesignated as § 46-1143 by S.L. 1998, ch. 176, § 42.

This section was formerly compiled as § 46-1154.

Sections 45 and 47 of S.L. 1984, ch. 92 contained repeals; sections 44 and 48 are compiled as §§ 46-1148 and 46-1158.

**46-1146. Prejudicial error. —** A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. [I.C., § 46-1155, as added by 1975, ch. 147, § 4, p. 339; am. and redesisg. 1998, ch. 176, § 45, p. 624.]

**Compiler's notes.** Former §§ 46-1146 and 46-1147, which comprised I.C., §§ 46-1146 and 46-1147 as added by 1975, ch. 147, § 4, p.

339, were repealed by S.L. 1984, ch. 92, § 43.

This section was formerly compiled as § 46-1155.

**46-1147. Petition for new trial — Newly discovered evidence — Fraud.** — At any time within one (1) year after sentence is imposed the accused may petition the adjutant general for a new trial on the grounds of newly discovered evidence or fraud on the court-martial. [I.C., § 46-1158, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 48, p. 190; am. and redesisg. 1998, ch. 176, § 46, p. 624.]

**Compiler's notes.** Former § 46-1147 was repealed. See Compiler's notes § 46-1146. This section was formerly compiled as § 46-1158.

Section 47 of S.L. 1984, ch. 92 contained repeals; section 46 is compiled as § 46-1154.

**46-1148. Unexecuted sentence — Remission — Suspension.** — (1) The governor or the adjutant general may remit or suspend any part or amount of the unexecuted portion of any sentence.

(2) **Administrative discharge.** The governor or the adjutant general may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial. [I.C., § 46-1159, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 49, p. 190; am. and redesisg. 1998, ch. 176, § 47, p. 624.]

**Compiler's notes.** Former § 46-1148 was amended and redesignated as § 46-1144 by S.L. 1998, ch. 176, § 43.

This section was formerly compiled as § 46-1159.

**46-1149. Restoration.** — (1) Under such regulations as may be prescribed pursuant to this act, all rights, privileges, and property affected by an executed portion of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed upon the accused by a new trial or rehearing.

(2) Where a previously executed sentence of dishonorable discharge or bad conduct discharge is not sustained at a new trial, the adjutant general shall substitute therefor a form of honorable discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.

(3) Where a previously executed sentence of dismissal is not sustained on a new trial, the adjutant general shall substitute therefor a form of honorable discharge authorized for administrative issuance or the officer dismissed by such sentence may be reappointed by the governor alone to such commissioned rank as in the opinion of the governor such former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be made effective as of the date of dismissal and he shall be carried on an unassigned list until a position vacancy shall occur. All time between the dismissal and such reappointment shall be considered as service for all state purposes. [I.C., § 46-1160, as added by 1975, ch. 147,



§ 4, p. 339; am. 1984, ch. 92, § 50, p. 190; am. and redesign. 1998, ch. 176, § 48, p. 624.]

**Compiler's notes.** Former §§ 46-1149 — 46-1153 which comprised I.C., §§ 46-1149 — 46-1153, as added by 1975, ch. 147, § 4, p. 339, were repealed by S.L. 1984, ch. 92, § 45.

For words "this act" see compiler's note, §§ 46-1101.

This section was formerly compiled as § 46-1160.

Section 51 of S.L. 1984, ch. 92 contained repeals; section 52 is compiled as § 46-1177.

**46-1150. Offenses subject to court-martial — Resolution of conflict with civil courts.** — The jurisdiction of courts-martial shall be limited to violations of the punitive articles in this code. Any person subject to this code who is charged with the commission of an offense which is not included in a punitive article under this code shall be surrendered to civil authorities for process in accordance with civil law. Any person so surrendered shall be considered properly absent from his military duties unless said person is found guilty of a violation of civil law. If said person is convicted of a civil offense, he shall be considered absent without leave from the time of such surrender, unless he has requested and been granted authorized leave by his commander. Conflicts over jurisdiction over offenses shall be resolved in favor of civil jurisdiction. [I.C., § 46-1162, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 49, p. 624.]

**Compiler's notes.** This section was formerly compiled as § 46-1162.

The words "this code" are defined in § 46-1102.

The reference to "punitive articles of this

code" may refer to §§ 46-1163 — 46-1187 which correspond to that part of the federal Uniform Code of Military Justice entitled "Punitive Articles."

**46-1151. Principal.** — Any person subject to this code who:

(1) Commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission; or

(2) Causes an act to be done which if directly performed by him would be punishable by this code, is a principal. [I.C., § 46-1163, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 50, p. 624.]

**Compiler's notes.** This section was formerly compiled as § 46-1163.

The words "this code" are defined in § 46-1102.

**46-1152. Accessory after the fact.** — Any person subject to this code who, knowing that an offense punishable by this code has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact. [I.C., § 46-1164, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 51, p. 624.]

**Compiler's notes.** This section was formerly compiled as § 46-1164.

The words "this code" are defined in § 46-1102.

**46-1153. Included offenses — Attempt.** — An attempt to commit an offense punishable by this code is an included offense in the charge of the

main offense, but no one shall be convicted of both the offense and attempt. [I.C., § 46-1165, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 52, p. 624.]

**Compiler's notes.** This section was formerly compiled as § 46-1165.

The words "this code" are defined in § 46-1102.

**46-1154. Perjury.** — Any person subject to this code who willfully gives false testimony under oath in the course of a judicial proceeding on the issue under inquiry shall be punished as a court-martial may direct. [I.C., § 46-1166, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 53, p. 624.]

**Compiler's notes.** Former § 46-1154 was amended and redesignated as § 46-1145 by S.L. 1998, ch. 176, § 44.

The words "this code" are defined in § 46-1102.

This section was formerly compiled as § 46-1166.

**46-1155. Fraudulent enlistment — Appointment — Separation.** — Any person subject to this code who:

(1) Procures his own enlistment in or appointment to the Idaho military by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) Procures his own separation from the Idaho military by knowingly false representation or deliberate concealment as to his eligibility for that separation, shall be punished as a court-martial may direct. [I.C., § 46-1167, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 54, p. 624.]

**Compiler's notes.** Former § 46-1155 was amended and redesignated as § 46-1146 by S.L. 1998, ch. 176, § 45.

The words "this code" are defined in § 46-1102.

This section was formerly compiled as § 46-1167.

**46-1156. Effecting unlawful enlistment — Appointment — Separation.** — Any person subject to this code who effects an enlistment or appointment in or a separation from the Idaho military of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct. [I.C., § 46-1168, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 55, p. 624.]

**Compiler's notes.** Former §§ 46-1156 and 46-1157, which comprised I.C., §§ 46-1156 and 46-1157, as added by 1975, ch. 147, § 4, p. 339, were repealed by S.L. 1984, ch. 92, § 47.

This section was formerly compiled as § 46-1168.

The words "this code" are defined in § 46-1102.

**46-1157. Disrespectful behavior to a superior officer, warrant officer or noncommissioned officer.** — Any person subject to this code



who behaves with disrespect toward a superior officer, warrant officer or noncommissioned officer shall be punished as a court-martial may direct. [I.C., § 46-1169, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 56, p. 624.]

**Compiler's notes.** This section was formerly compiled as § 46-1169.

Former § 46-1157 was repealed. See Compiler's note § 46-1156.

The words "this code" are defined in § 46-1102.

**46-1158. Assaulting or willfully disobeying superior officer, warrant officer or noncommissioned officer.** — Any person subject to this code who:

(1) Strikes his superior commissioned, warrant or noncommissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) Willfully disobeys a lawful command of his superior commissioned, warrant or noncommissioned officer; shall be punished as a court-martial may direct. [I.C., § 46-1170, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 57, p. 624.]

**Compiler's notes.** Former § 46-1158 was amended and redesignated as § 46-1147 by S.L. 1998, ch. 176, § 46.

This section was formerly compiled as § 46-1170.

The words "this code" are defined in § 46-1102.

**46-1159. Cruelty, oppression or maltreatment of subordinates.** — Any person subject to this code who acts cruelly or oppressively toward or maltreats any person subject to his orders shall be punished as a court-martial may direct. [I.C., § 46-1171, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 58, p. 624.]

**Compiler's notes.** Former § 46-1159 was amended and redesignated as § 46-1148 by S.L. 1998, ch. 176, § 47.

This section was formerly compiled as § 46-1171.

The words "this code" are defined in § 46-1102.

**46-1160. False record or document.** — Any person subject to this code who, with intent to deceive, signs any false record, return, regulation, order, or other official document knowing the same to be false, or makes any other false official statement knowing the same to be false shall be punished as a court-martial may direct. [I.C., § 46-1172, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 59, p. 624.]

**Compiler's notes.** Former § 46-1160 was amended and redesignated as § 46-1149 by S.L. 1998, ch. 176, § 48.

This section was formerly compiled as § 46-1172.

The words "this code" are defined in § 46-1102.

**46-1161. Sale — Neglect — Damage of military property.** — Any person subject to this code who, without proper authority:

(1) Sells or otherwise disposes of; or

(2) Willfully or through neglect damages, destroys, or loses; or

(3) Willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of;

any military property of the United States or of this state shall be punished as a court-martial may direct. [I.C., § 46-1173, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 60, p. 624.]

**Compiler's notes.** Former § 46-1161, which comprised I.C., § 46-1161, as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 51.

This section was formerly compiled as § 46-1173.

The words "this code" are defined in § 46-1102.

**Cross ref.** Court-martial for loss or misuse of military property, §§ 46-302, 46-306.

**46-1162. Unauthorized, drunk or reckless operation of a military vehicle or aircraft.** — Any person subject to this code who operates any military vehicle or aircraft while drunk, or when the alcohol concentration in the person's blood or breath is 0.08 grams of alcohol per 100 milliliters of blood or 0.08 grams of alcohol per 210 liters of breath or in a reckless or wanton manner, or without authority, shall be punished as a court-martial may direct. [I.C., § 46-1174, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 61, p. 624.]

**Compiler's notes.** As enacted the section heading of this section read "Unauthorized — Drunk — Or reckless operation of a military vehicle or aircraft."

Former § 46-1162 was amended and redesignated as § 46-1150 by S.L. 1998, ch. 176, § 49.

This section was formerly compiled as § 46-1174.

The words "this code" are defined in § 46-1102.

**46-1163. Drunk on duty.** — Any person subject to this code, other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct. [I.C., § 46-1175, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 62, p. 624.]

**Compiler's notes.** Former § 46-1163 was amended and redesignated as § 46-1151 by S.L. 1998, ch. 176, § 50.

This section was formerly compiled as § 46-1175.

The words "this code" are defined in § 46-1102.

**46-1164. Mutiny.** — Any person subject to this code who, with intent to usurp or override lawful military authority, refuses, in concert with any other person or persons subject to this code, to obey orders or otherwise do his duty, shall be punished as a court-martial may direct. [I.C., § 46-1176, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 63, p. 624.]



**Compiler's notes.** Former § 46-1164 was amended and redesignated as § 46-1152 by S.L. 1998, ch. 176, § 51.

This section was formerly compiled as § 46-1176.

The words "this code" are defined in § 46-1102.

**46-1165. Failure to obey orders — Dereliction in duty.** — Any person subject to this code who, without justifying circumstances:

(1) Violates or fails to obey any lawful order or regulation; or

(2) Is derelict in the performance of his duties,

shall be punished as a court-martial may direct. [I.C., § 46-1177, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 52, p. 190; am. and redesign. 1998, ch. 176, § 64, p. 624.]

**Compiler's notes.** Former § 46-1165 was amended and redesignated as § 46-1153 by S.L. 1998, ch. 176, § 52.

This section was formerly compiled as § 46-1177.

The words "this code" are defined in § 46-1102.

Section 51 of S.L. 1984, ch. 92 contained repeals; section 50 is compiled as § 46-1160 and § 53 is compiled as § 46-1184.

**46-1166. Absence without leave.** — Any person subject to this code who, without prior authority or justifying reason:

(1) Fails to go to his appointed place of duty at the time prescribed; or

(2) Goes from that place; or

(3) Absents himself and remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed, shall be punished as a court-martial may direct. [I.C., § 46-1178, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 65, p. 624.]

**Compiler's notes.** Former § 46-1166 was amended and redesignated as § 46-1154 by S.L. 1998, ch. 176, § 53.

This section was formerly compiled as § 46-1178.

The words "this code" are defined in § 46-1102.

**Collateral References.** 6 C.J.S., Armed Services, § 32.

**46-1167. Missing movement.** — Any person subject to this code who, through neglect or design, misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct. [I.C., § 46-1179, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 66, p. 624.]

**Compiler's notes.** Former § 46-1167 was amended and redesignated as § 46-1155 by S.L. 1998, ch. 176, § 54.

This section was formerly compiled as § 46-1179.

The words "this code" are defined in § 46-1102.

**46-1168. Desertion.** — Any person subject to this code who:

(1) Without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) Quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) Without being regularly separated from the state military enlists or accepts an appointment in the same or another military component or organization without fully disclosing the fact that he has not been so regularly separated, is guilty of desertion and shall be punished as a court-martial may direct, provided, however, that no member of the Idaho military shall be, in time of peace or order, prohibited from accepting bona fide employment in another state or leave the boundaries of this state in pursuance of his vocation, education or profession, if before so doing, he fully informs his commanding officer of his absence from the state and the reasons therefor, provided, however, that the said commanding officer may waive the requirement that he be informed. [I.C., § 46-1180, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 67, p. 624.]

**Compiler's notes.** Former § 46-1168 was amended and redesignated as § 46-1156 by S.L. 1998, ch. 176, § 55.

This section was formerly compiled as § 46-1180.

The words "this code" are defined in § 46-1102.

**Collateral References.** 6 C.J.S., Armed Services, § 156.

**46-1169. Feigning illness, disablement, mental lapse or derangement — Self-injury.** — Any person subject to this code who, for the purpose of avoiding work, duty, or service:

- (1) Feigns illness, physical disablement, mental lapse or derangement; or
- (2) Intentionally inflicts self-injury;

shall be punished as a court-martial may direct. [I.C., § 46-1181, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 68, p. 624.]

**Compiler's notes.** As enacted the section heading of this section read "Feigning illness — Physical disablement — Mental lapse or derangement — Self-injury."

Former § 46-1169 was amended and redesignated as § 46-1157 by S.L. 1998, ch. 176, § 56.

This section was formerly compiled as § 46-1181.

The words "this code" are defined in § 46-1102.

**46-1170. Drunk or asleep at post — Leaving post before regular relief.** — Any sentinel or guard subject to this code who is found drunk or sleeping upon his post, or who leaves his post before he is regularly relieved, shall be punished as a court-martial may direct. [I.C., § 46-1182, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 69, p. 624.]

**Compiler's notes.** Former § 46-1170 was amended and redesignated as § 46-1158 by S.L. 1998, ch. 176, § 57.

This section was formerly compiled as § 46-1182.

The words "this code" are defined in § 46-1102.

**Collateral References.** 6 C.J.S., Armed Services, § 164.

**46-1171. Public property — Captured or abandoned property — Private disposal for profit — Looting.** — (1) All persons subject to this code shall secure all public property taken for the service of the state of Idaho and shall give notice and turn over to the proper authority without



delay all captured or abandoned property in their possession, custody or control.

(2) Any person subject to this code who, while on duty:

(a) Fails to carry out the duties prescribed in subsection (1) of this section; or

(b) Buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or another directly or indirectly concerted with himself; or

(c) Engages in looting or pillaging,

shall be punished as a court-martial may direct. [I.C., § 46-1184, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 53, p. 190; am. and redesign. 1998, ch. 176, § 70, p. 624.]

**Compiler's notes.** Former § 46-1171 was amended and redesignated as § 46-1159 by S.L. 1998, ch. 176, § 58.

This section was formerly compiled as § 46-1184.

The words "this code" are defined in § 46-1102.

Section 52 of S.L. 1984, ch. 92 is compiled as § 46-1177; section 54 contained repeals and § 55 is compiled as § 46-1187.

**Cross ref.** Loss or misuse of military property, court-martial, §§ 46-302, 46-306.

**46-1172. Conspiracy.** — Any person subject to this code who conspires with any other person to commit an offense under this code shall, if one (1) or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. [I.C., § 46-1172, as added by 1998, ch. 176, § 71, p. 624.]

**Compiler's notes.** Former § 46-1172 was amended and redesignated as § 46-1160 by S.L. 1998, ch. 176, § 59.

**46-1173. Solicitation.** — Any person subject to this code who solicits or advises another or others to commit an offense under this code shall be punished with the punishment provided for the commission of the offense, but if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct. [I.C., § 46-1173, as added by 1998, ch. 176, § 72, p. 624.]

**Compiler's notes.** Former § 46-1173 was amended and redesignated as § 46-1161 by S.L. 1998, ch. 176, § 60.

**46-1174. Resistance, breach of arrest, and escape.** — Any person subject to this code who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct. [I.C., § 46-1174, as added by 1998, ch. 176, § 73, p. 624.]

**Compiler's notes.** Former § 46-1174 was amended and redesignated as § 46-1162 by S.L. 1998, ch. 176, § 61.

**46-1175. Releasing prisoner without proper authority.** — Any person subject to this code who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law. [I.C., § 46-1175, as added by 1998, ch. 176, § 74, p. 624.]

**Compiler's notes.** Former § 46-1175 was amended and redesignated as § 46-1163 by S.L. 1998, ch. 176, § 62.

**46-1176. Unlawful detention.** — Any person subject to this code who, except as provided by law, apprehends, arrests or confines any person shall be punished as a court-martial may direct. [I.C., § 46-1176, as added by 1998, ch. 176, § 75, p. 624.]

**Compiler's notes.** Former § 46-1176 was amended and redesignated as § 46-1164 by S.L. 1998, ch. 176, § 63.

**46-1177. Wrongful use, possession, etc., of controlled substances.** — (1) Any person subject to this code who wrongfully uses, possesses, manufactures or distributes, on an installation, vessel, vehicle, or aircraft used by or under the control of the military a substance described in subsection (2) of this section shall be punished as a court-martial may direct.

(2) The substances referred to in subsection (1) of this section are the following:

(a) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.

(b) Any other substance not specified in paragraph (a) of this subsection that is listed in schedules I through V of the uniform controlled substances act, chapter 27, title 37, Idaho Code. [I.C., § 46-1177, as added by 1998, ch. 176, § 76, p. 624.]

**Compiler's notes.** Former § 46-1177 was amended and redesignated as § 46-1165 by S.L. 1998, ch. 176, § 64.

**46-1178. Frauds against the government.** — Any person subject to this code,

(1) Who knowingly:

(a) Makes any false claim or fraudulent claim against the state of Idaho or the United States or any officer thereof; or

(b) Presents to any person in the civil or military service thereof, for approval or payment, any false or fraudulent claim against the state of Idaho or the United States or any officer thereof; or

(2) Who, for the purpose of obtaining the approval, allowance, or payment of any claim against the state of Idaho or the United States or any officer thereof:



- (a) Makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;
  - (b) Makes any oath to any fact or to any writing or other paper knowing the oath to be false; or
  - (c) Forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited; or
- (3) Who, having charge, possession, custody, or control of any money, or other property of the state of Idaho or the United States, furnished or intended for the military thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or
- (4) Who, being authorized to make or deliver any paper, certifying the receipt of any property of the state of Idaho or the United States furnished or intended for the military thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the state of Idaho or the United States; shall be punished as a court-martial may direct. [I.C., § 46-1178, as added by 1998, ch. 176, § 77, p. 624.]

**Compiler's notes.** Former § 46-1178 was amended and redesignated as § 46-1166 by S.L. 1998, ch. 176, § 65.

**46-1179. Aiding the enemy.** — Any person subject to this code who:

- (1) Aids or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or
  - (2) Without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with the enemy, either directly or indirectly;
- shall be punished as a court-martial may direct. [I.C., § 46-1179, as added by 1998, ch. 176, § 78, p. 624.]

**Compiler's notes.** Former § 46-1179 was amended and redesignated as § 46-1167 by S.L. 1998, ch. 176, § 66.

**46-1180. Conduct unbecoming an officer.** — Any commissioned officer, warrant officer, or cadet who is convicted of conduct unbecoming an officer, as explained in the manual for courts-martial under article 133 of the uniform code of military justice, shall be punished as a court-martial may direct. [I.C., § 46-1180, as added by 1998, ch. 176, § 79, p. 624.]

**Compiler's notes.** Former § 46-1180 was amended and redesignated as § 46-1168 by S.L. 1998, ch. 176, § 67.

**46-1181. General article.** — Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the military, all conduct of a nature to bring discredit upon the military, and crimes and offenses not capital, or which persons subject to this chapter may be guilty, shall be taken cognizance of by a general or

special court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. Offenses which may be punished under this section include, but are not limited to, those offenses set out in the manual for courts-martial as punishable under article 134 of the uniform code of military justice. [I.C., § 46-1181, as added by 1998, ch. 176, § 80, p. 624.]

**Compiler's notes.** Former § 46-1181 was amended and redesignated as § 46-1169 by S.L. 1998, ch. 176, § 68.

**46-1182. Trial of civil-type offenses by military members in event of prolonged statewide suspension of civil courts.** — In the event that the civil judiciary is not functioning to try cases for long periods of time statewide so that there is no forum in which to try allegations against military members of felonious civil offenses, this code incorporates 10 U.S.C. secs. 916, 918-930 and 932 for trial by courts-martial, pursuant to the provisions of this code. [I.C., § 46-1187, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 55, p. 190; am. and redesisg. 1998, ch. 176, § 81, p. 624.]

**Compiler's notes.** Former § 46-1182 was amended and redesignated as § 46-1170 by S.L. 1998, ch. 176, § 69.

This section was formerly compiled as § 46-1187.

The words "this code" are defined in § 46-1102.

Sections 54 and 56 of S.L. 1984, ch. 92 contained repeals; sections 53 and 57 are compiled as §§ 46-1184 and 46-1191 (now 46-1183).

**46-1183. Administration of oaths — Affidavits.** — Commissioned officers shall have the power to administer oaths for the purpose of military administration, including military justice, and affidavits may be taken for such purposes before such officers. [I.C., § 46-1191, as added by 1975, ch. 147, § 4, p. 339; am. 1984, ch. 92, § 57, p. 190; am. and redesisg. 1998, ch. 176, § 82, p. 624.]

**Compiler's notes.** Former § 46-1183, which comprised I.C., § 46-1183, as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 51.

This section was formerly compiled as § 46-1191.

Sections 56 and 58 of S.L. 1984, ch. 92

contained repeals; sections 55 and 59 are compiled as §§ 46-1187 and 46-1193 (now 46-1185).

**Cross ref.** Oath of commissioned officers, § 46-202.

Oath of enlistment, § 46-210.

Oaths in military courts, § 46-1130.

**46-1184. Fines — Payment into state general fund.** — Fines may be paid to a military court or to an officer executing its process. The amount of any such fine may be noted upon any state roll or account for pay of the delinquent and deducted from any pay or allowance due or thereafter to become due him, until the said fine is liquidated. Any sum so deducted from any state pay or allowance shall be turned into the military court which imposed the fine and shall be paid over by the officer receiving the same within thirty (30) days to the state treasurer and credited to the general fund. Any expense incurred to administer or carry out the provisions of this



chapter shall be paid out of the general fund. [I.C., § 46-1192, as added by 1975, ch. 147, § 4, p. 339; am. and redesign. 1998, ch. 176, § 83, p. 624.]

**Compiler's notes.** Former § 46-1184 was amended and redesignated as § 46-1171 by S.L. 1998, ch. 176, § 70.

This section was formerly compiled as § 46-1192.

**46-1185. Regulatory authority.** — The adjutant general shall have authority to promulgate such regulations as he deems necessary and proper to carry out the intent of this code. [I.C., § 46-1193, as added by 1984, ch. 92, § 59, p. 190; am. and redesign. 1998; ch. 176, § 84, p. 624.]

**Compiler's notes.** Former §§ 46-1185 and 46-1186, which comprised I.C., §§ 46-1185 and 46-1186 as added by 1975, ch. 147, § 4, p. 339, were repealed by S.L. 1984, ch. 92, § 54.

Former § 46-1193, which comprised I.C., § 46-1193, as added by 1975, ch. 147, § 4, p. 339, was repealed by S.L. 1984, ch. 92, § 58.

This section was formerly compiled as § 46-1193.

The word "code" referred to in this section is defined in § 46-1102.

Section 57 of S.L. 1984, ch. 92 is compiled as § 46-1191 (now 46-1183).

**46-1186. Immunity.** — All persons acting under the provisions of this chapter, whether as a member of the military or as a civilian, shall be immune from any personal liability for any of their acts or omissions which they did or failed to do as part of their duties under this chapter. [I.C., § 46-1186, as added by 1998, ch. 176, § 85, p. 624.]

**Compiler's notes.** Former § 46-1186 was repealed. See Compiler's notes § 46-1185.

**46-1187. Severability.** — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act. [I.C., § 46-1187, as added by 1998, ch. 176, § 87, p. 624.]

**Compiler's notes.** Former § 46-1187 was amended and redesignated as § 46-1182 by S.L. 1998, ch. 176, § 81.

**46-1188 — 46-1190. Courts of inquiry — Complaints — State judge advocate. [Repealed.]**

**Compiler's notes.** These sections, which comprised I.C., §§ 46-1188 — 46-1190, as

added by 1975, ch. 147, § 4, p. 339, were repealed by S.L. 1984, ch. 92, § 56.

**46-1191 — 46-1193. [Amended and Redesignated.]**

**Compiler's notes.** Former §§ 46-1191 — 46-1193 were amended and redesignated as

§§ 46-1183 — 46-1185, respectively, by S.L. 1998, ch. 176, §§ 82-84.

**46-1194. Severability. [Repealed.]**

**Compiler's notes.** This section, which comprised I.C., § 46-1194 as added by 1975,

ch. 147, § 4, p. 339, was repealed by S.L. 1998, ch. 176, § 86, effective July 1, 1998.





## TITLE 47

### MINES AND MINING

#### CHAPTER

1. INSPECTOR OF MINES, §§ 47-101 — 47-114.
2. BUREAU OF MINES AND GEOLOGY, §§ 47-201 — 47-204.
3. OIL AND GAS WELLS — GEOLOGIC INFORMATION, AND PREVENTION OF WASTE, §§ 47-301 — 47-332.
- 4, 5. [REPEALED.]
6. LOCATION OF MINING CLAIMS, §§ 47-601 — 47-619.
7. MINERAL RIGHTS IN STATE LANDS, §§ 47-701 — 47-718.
8. OIL AND GAS LEASES ON STATE AND SCHOOL LANDS, §§ 47-801 — 47-812.
9. RIGHTS OF WAY AND EASEMENTS FOR DEVELOPMENT OF MINES, §§ 47-901 — 47-913.
10. MINING TUNNELS, §§ 47-1001 — 47-1004.
11. PROCEEDING BY LIENHOLDER UPON

#### CHAPTER

- UNPATENTED MINING CLAIM TO PREVENT. FORFEITURE, §§ 47-1101, 47-1102.
12. LICENSE TAX FOR PRIVILEGE OF MINING AND EXTRACTING ORES, §§ 47-1201 — 47-1208.
13. DREDGE MINING, §§ 47-1301 — 47-1324.
14. MINERAL LEASES BY POLITICAL SUBDIVISIONS AND MUNICIPALITIES, §§ 47-1401 — 47-1403.
15. SURFACE MINING, §§ 47-1501 — 47-1519.
16. GEOTHERMAL RESOURCES, §§ 47-1601 — 47-1611.
17. IDAHO ABANDONED MINE RECLAMATION ACT, §§ 47-1701 — 47-1708.
18. FINANCIAL ASSURANCE, §§ 47-1801 — 47-1805.

### CHAPTER 1

#### INSPECTOR OF MINES

##### SECTION.

- 47-101, 47-102. [Amended and Redesignated.]  
47-102A, 47-103. [Repealed.]  
47-104 — 47-107. [Amended and Redesignated.]  
47-108. [Repealed.]

##### SECTION.

- 47-109. [Amended and Redesignated.]  
47-110. [Repealed.]  
47-111. [Amended and Redesignated.]  
47-112, 47-113. [Repealed.]  
47-114, 47-115. [Amended and Redesignated.]

#### 47-101. [Amended and Redesignated.]

**Compiler's notes.** This section which comprised 1895, p. 160, §§ 1, 2, 13; reen. 1899, p. 221, §§ 1, 2, 13; compiled and reen. R.C., § 199; am. 1911, ch. 199, § 1, p. 663; reen. C. L. 228:1; C.S., § 5470; am. 1921, ch. 24, § 1, p. 32; am. 1927, ch. 131, § 1, p. 174; I.C.A., § 46-101; am. 1941, ch. 48, § 1, p. 103; am. 1945, ch. 29, § 1, p. 36; am. 1949, ch. 173, § 1,

p. 370; am. 1951, ch. 25, § 1, p. 37; am. 1953, ch. 216, § 2, p. 330; am. 1957, ch. 316, § 2, p. 674; am. 1961, ch. 325, § 1, p. 617; am. 1967, ch. 126, § 1, p. 294; am. 1969, ch. 35, § 2, p. 74; am. 1971, ch. 136, § 33, p. 522 was amended and redesignated as § 44-112 (now repealed) by S.L. 1974, ch. 39, § 13.

#### 47-102. [Amended and Redesignated.]

**Compiler's notes.** This section which comprised 1893, p. 152, § 2; am. 1895, p. 160, § 2; reen. 1899, p. 221, § 3; reen. R.C., § 200; reen. C.L. 228:2; C.S., § 5471; I.C.A., § 46-

102; am. 1969, ch. 35, § 3, p. 74 was amended and redesignated as § 44-113 (now repealed) by S.L. 1974, ch. 39, § 14.

#### 47-102A. Definition of the term "mine." [Repealed.]

**Compiler's notes.** This section which comprised I.C., § 47-102A as added by 1969, ch.

35, § 4, p. 74 was repealed by S.L. 1974, ch. 39, § 1.

**47-103. Duties in general. [Repealed.]**

**Compiler's notes.** This section, which comprised 1893, p. 152, § 4; am. 1895, p. 160, § 3; reen. 1899, p. 221, § 4; reen. R.C., § 201; C.L. 228:3; C.S., § 5472; I.C.A., § 46-103; am.

1935, ch. 64, § 1, p. 118; am. 1951, ch. 211, § 1, p. 439; am. 1967, ch. 177, § 1, p. 588; am. 1969, ch. 35, § 5, p. 74, was repealed by S.L. 1974, ch. 39, § 1.

**47-104. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1893, p. 152, § 5; am. 1895, p. 160, § 4; reen. 1899, p. 221, § 5; reen. R.C., § 202; reen. C.L. 228:4; C.S. § 5473; I.C.A., § 46-

104; am. 1951, ch. 211, § 2, p. 439; am. 1969, ch. 35, § 6, p. 74 was amended and redesignated as § 44-109 (now repealed) by S.L. 1974, ch. 39, § 10.

**47-105. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1893, p. 152, § 6; am. 1895, p. 160, § 5; reen. 1899, p. 221, § 6; reen. R.C., § 203; reen. C.L. 228:5; C.S., § 5474; I.C.A., § 46-

105; am. 1969, ch. 35, § 7, p. 74 was amended and redesignated as § 44-115 (now repealed) by S.L. 1974, ch. 39, § 16.

**47-106. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1893, p. 152, § 7; am. 1895, p. 160, § 6; reen. 1899, p. 221, § 7; reen. R.C., § 204; reen. C.L. 228:6; C.S., § 5475; I.C.A., § 44-

106; am. 1969, ch. 35, § 8, p. 74 was amended and redesignated as § 44-110 (now repealed) by S.L. 1974, ch. 39, § 11.

**47-107. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1893, p. 152, § 9; am. 1895, p. 160, § 8; reen. 1899, p. 221, § 8; reen. R.C., § 205; C.L. 228:7; C.S., § 5476; I.C.A., § 46-107; am.

1969, ch. 35, § 9, p. 74 was amended and redesignated as § 44-111 (now repealed) by S.L. 1974, ch. 39, § 12.

**47-108. Deputies — Appointment and compensation. [Repealed.]**

**Compiler's notes.** This section, which comprised 1895, p. 160, § 9; reen. 1899, p. 221, § 9; reen. R.C., § 206; reen. C.L. 228:8;

C.S., § 5477; I.C.A., § 46-108; am. 1949, ch. 162, § 1, p. 351; am. 1967, ch. 177, § 2, p. 588, was repealed by S.L. 1974, ch. 39, § 1.

**47-109. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1895, p. 160, § 10; reen. R.C., § 207; reen. C.L. 228:9; C.S., § 5478; I.C.A., § 46-

109 was amended and redesignated as § 44-114 (now repealed) by S.L. 1974, ch. 39, § 15.

**47-110. Duties of deputies. [Repealed.]**

**Compiler's notes.** This section which comprised 1895, p. 160, § 11; reen. 1899, p. 221, § 11; reen. R.C., § 208; reen. C.L. 228:10;

C.S., § 5479; I.C.A., § 46-110; am. 1951, ch. 26, § 1, p. 38 was repealed by S.L. 1974, ch. 39, § 1.



**47-111. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1895, p. 160, § 12; reen. 1899, p. 221, § 12; compiled and reen. R.C., § 209; C.L. 228:11; C.S., § 5480; I.C.A., § 46-111; am.

1969, ch. 35, § 10, p. 74 was amended and redesignated as § 44-116 (now repealed) by S.L. 1974, ch. 39, § 17.

**47-112. Mineral exhibit — Duties of inspector. [Repealed.]**

**Compiler's notes.** This section which comprised I.C., § 47-112 as added by 1969, ch. 35, § 12, p. 74 was repealed by S.L. 1974, ch. 39,

§ 1. For present law see § 44-120 (now repealed).

**47-113. Federal aid. [Repealed.]**

**Compiler's notes.** This section which comprised I.C., § 47-113 as added by 1969, ch. 35,

§ 13, p. 74 was repealed by S.L. 1974, ch. 39, § 1.

**47-114. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1969, ch. 186, § 1, p. 551 was amended

and redesignated as § 44-117 (now repealed) by S.L. 1974, ch. 39, § 18.

**47-115. [Amended and Redesignated.]**

**Compiler's notes.** This section which comprised 1969, ch. 186, § 2, p. 551 was amended

and redesignated as § 44-118 (now repealed) by S.L. 1974, ch. 39, § 19.

**CHAPTER 2****BUREAU OF MINES AND GEOLOGY****SECTION.**

47-201. Geological survey created — Purpose — Advisory board.

47-202. Meetings — Office — State geologist.

47-203. Duties — Publications — Coopera-

**SECTION.**

tion with other agencies — Satellite offices.

47-204. Reports.

**47-201. Geological survey created — Purpose — Advisory board.**

— There is hereby created the Idaho geological survey, to be administered as a special program at the university of Idaho under the authority of the board of regents of the university of Idaho. The survey shall be the lead state agency for the collection, interpretation, and dissemination of geologic and mineral data for Idaho. Such information is to be acquired through field and laboratory investigations by the staff of the survey and through cooperative programs with other governmental and private agencies. There is hereby established an advisory board for the survey, consisting of the following members: The director of the survey and board chairperson (nonvoting); the chair of the department of geosciences at Boise state university; the chair of the department of geosciences at Idaho state university; the chair of the department of geological sciences at the university of Idaho; a representative from the mining and mineral processing industry selected by the director; the governor of the state of Idaho or his designated representative; a member of the board of land commissioners designated by the state land

board; the president or his designee of the Idaho association of professional geologists; and two (2) members at large selected by the director from other state or federal organizations, or from the private sector with a direct interest in the survey's programs, both serving two (2) year staggered terms; all of whom shall serve as members of the said board and shall be compensated as provided by section 59-509(b), Idaho Code. [1919, ch. 54, § 1, p. 163; C.S., § 5481; I.C.A., § 46-201; am. 1933, ch. 22, § 1, p. 29; am. 1974, ch. 17, § 26, p. 308; am. 1980, ch. 247, § 45, p. 582; am. 1984, ch. 101, § 1, p. 229; am. 2003, ch. 46, § 1, p. 174.]

**Compiler's notes.** Section 25 of S.L. 1974, ch. 17 is compiled as § 42-3604.

Section 43 of S.L. 1980, ch. 247 is compiled as § 42-3508, § 44-120n has been repealed, §§ 46-48 have been repealed, and § 49 is compiled as § 54-205.

**Cross ref.** Practical prospecting and practical mining courses, at University of Idaho, § 33-2815.

**47-202. Meetings — Office — State geologist.** — The advisory board shall hold an annual meeting at the university of Idaho, Boise state university or Idaho state university and such other meetings as it may determine. The chief office of said survey shall be maintained at the university of Idaho. The director of the survey shall report to the president of the university of Idaho through the vice president for research at the university of Idaho. The director, or a professional geologist in the survey if so appointed by the director, is designated state geologist. [1919, ch. 54, § 2, p. 163; C.S., § 5482; I.C.A., § 46-202; am. 1974, ch. 17, § 27, p. 308; am. 1984, ch. 101, § 2, p. 229; am. 2003, ch. 46, § 2, p. 174.]

**47-203. Duties — Publications — Cooperation with other agencies — Satellite offices.** — It shall be the duty of the said state survey to conduct statewide studies in the field; laboratory studies; prepare and publish reports on the geology, hydrogeology, geologic hazards and mineral resources of the state; fix a price upon printed reports not used in exchange with other state bureaus or surveys, universities or public libraries, and deposit receipts from sales in a printing fund to be used for the preparation and publication of reports of the survey, and for no other purpose. The survey shall be allowed to seek and accept funded projects from and cooperative programs with other agencies for support of the survey's research and service activities as authorized by the board of regents. All funds received from these projects shall be used for said projects and services. The survey shall be allowed to have satellite offices at the geology departments of Boise state university and Idaho state university. [1919, ch. 54, § 3, p. 163; C.S., § 5483; I.C.A., § 46-203; am. 1933, ch. 22, § 2, p. 29; am. 1974, ch. 17, § 28, p. 308; am. 1984, ch. 101, § 3, p. 229; am. 2003, ch. 46, § 3, p. 174.]

**Compiler's notes.** Section 4 of S.L. 1919, ch. 54 provided an appropriation for 1919-1921.

Section 3 of S.L. 1933, ch. 22 repealed all

laws and parts of laws in conflict therewith.

Section 4 declared an emergency. Approved Feb. 2, 1933.



**47-204. Reports.** — The state geological survey shall annually, on or before the first day of January, make to the governor of the state and to the president of the university of Idaho a report detailing major events during the previous year concerning the geology and mineral resources of the state, a report of its expenditures and of the work of said survey during the preceding year, and budget requests for the following year; and it shall make a similar report of its doings and its expenditures to the state legislature through the legislative council. [1919, ch. 54, § 5, p. 164; C.S., § 5484; I.C.A., § 46-204; am. 1974, ch. 17, § 29, p. 308; am. 1984, ch. 101, § 4, p. 229.]

**Compiler's notes.** Section 30 of S.L. 1974, ch. 17, is compiled as § 47-317.  
Section 6 of S.L. 1919, ch. 54 declared an emergency. Approved March 14, 1919.

Section 75 of S.L. 1974, ch. 17, provided that the act should take effect on and after July 1, 1974.

### CHAPTER 3

#### OIL AND GAS WELLS — GEOLOGIC INFORMATION, AND PREVENTION OF WASTE

##### SECTION.

- 47-301 — 47-305. [Repealed.]
- 47-306. Records of logs — Classification of rocks, fossils, and minerals — Reports to authorized persons.
- 47-307. Use of information.
- 47-308 — 47-314. [Repealed.]
- 47-315. Public interest.
- 47-316. Waste prohibited.
- 47-317. Oil and gas conservation commission created — Powers — Attorney general.
- 47-318. Definitions.
- 47-319. Land subject to act — Authority of commission.
- 47-320. Permit to drill.
- 47-321. Spacing units.
- 47-322. Integration of tracts — Orders of commission.

##### SECTION.

- 47-323. Approval of agreements by commission — Defense to litigation.
- 47-324. Rules for commission.
- 47-325. Powers of commission — Witnesses — Penalty.
- 47-326. Actions against the commission — Appeals — Falsification of records — Limitation of actions.
- 47-327. Lands subject to this act.
- 47-328. Act not construed to restrict production.
- 47-329. Title.
- 47-330. Oil and gas conservation fund created — Tax.
- 47-331. Additional tax on oil and gas produced.
- 47-332. Distribution of revenues.

**47-301 — 47-305. Geological information — Log drilling operations — Certified copy of log — Filing — Sample of minerals and formations penetrated — Information and reports confidential — Application for forms and containers. [Repealed.]**

**Compiler's notes.** These sections, which comprised S.L. 1931, ch. 115, §§ 1-5, p. 196;

I.C.A., §§ 46-301 — 46-305, were repealed by S.L. 1963, ch. 148, § 18.

**47-306. Records of logs — Classification of rocks, fossils, and minerals — Reports to authorized persons.** — The bureau of mines and geology shall preserve orderly records of logs filed with it and shall determine and record and classify rocks shown by samples, identify fossils and minerals, and, on request, shall supply to the properly authorized

person, connected with the drilling operations from which logs and samples are received a report of such determinations and identifications. [1931, ch. 115, § 6, p. 196; I.C.A., § 46-306.]

**47-307. Use of information.** — The bureau of mines and geology is hereby authorized to utilize in its study of regional rock structures, mineral deposits, and underground water resources, the information so derived. [1931, ch. 115, § 7, p. 196; I.C.A., § 46-307.]

**47-308 — 47-314. Conditions for publication of information — Penalty for noncompliance — Separate offenses — Prevention of waste — Incasing of oil and gas wells — Filling and plugging of wells about to be abandoned — Wasteful use of natural gas prohibited — Violation a misdemeanor. [Repealed.]**

**Compiler's notes.** These sections, which — 46-314, were repealed by S.L. 1963, ch. comprised S.L. 1931, ch. 115, §§ 8, 9, p. 196; 148, § 18.  
1931, ch. 111, §§ 1-5, p. 191; I.C.A., §§ 46-308

**47-315. Public interest.** — It is declared to be in the public interest to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the state of Idaho in such a manner as will prevent waste; to authorize and to provide for the operations and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners be fully protected; to encourage, authorize and provide for voluntary agreements for cycling, recycling, pressure maintenance and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers and the general public may realize and enjoy the greatest possible good from these vital natural resources. [1963, ch. 148, § 1, p. 433.]

**47-316. Waste prohibited.** — The waste of oil and gas or either of them as in this act defined is hereby prohibited. [1963, ch. 148, § 2, p. 433.]

**Compiler's notes.** The words "this act" refer to S.L. 1963, ch. 148 which is compiled as §§ 47-315 — 47-330.

**47-317. Oil and gas conservation commission created — Powers — Attorney general.** — (a) There is hereby created an oil and gas conservation commission of the state of Idaho which shall consist of the state board of land commissioners.

(b) The commission shall have and is hereby given jurisdiction and authority over all persons and property, public and private, necessary to enforce the provisions of this act, and shall have power and authority to make and enforce rules, regulations and orders, and do whatever may reasonably be necessary to carry out the provisions of this act. Any



delegation of authority to any other state officer, board or commission to administer any and all other laws of this state relating to the conservation of oil and gas, or either of them is hereby rescinded and withdrawn and such authority is hereby unqualifiedly conferred upon the commission, as herein provided. Any person, or the attorney general, on behalf of the state, may apply for a hearing before the commission, or the commission may initiate proceedings, upon any question relating to the administration of this act, and jurisdiction is hereby conferred upon the commission to hear and determine the same and enter its rule, regulation or order with respect thereto.

(c) The commission may sue and be sued in its administration of this act in any state or federal district court in the state of Idaho having jurisdiction of the parties or of the subject matter.

(d) The attorney general shall act as the legal advisor of the commission and represent the commission in all court proceedings and in all proceedings before it, and in any proceedings to which the commission may be a party before any department of the federal government. [1963, ch. 1-8, § 3, p. 433; am. 1974, ch. 17, § 30, p. 308.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

compiled as §§ 47-204 and 47-320, respectively.

Sections 29 and 31 of S.L. 1974, ch. 17, are

**47-318. Definitions.** — Unless the context otherwise requires, the terms defined in this section shall have the following meaning when used in this act:

(a) The word "Commission" shall mean the oil and gas conservation commission.

(b) "Waste" as applied to oil means and includes underground waste; inefficient, excessive or improper use or dissipation of reservoir energy, including gas energy and water drive; surface waste, open-pit storage, and waste incident to the production of oil in excess of the producer's above-ground storage facilities and lease and contractual requirements, but excluding storage (other than open-pit storage) reasonably necessary for building up and maintaining crude stocks and products thereof for consumption, use and sale; the locating, drilling, equipping, operating, or producing of any well in a manner that causes, or tends to cause, reduction of the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations.

(c) "Waste" as applied to gas shall include the escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas in an excessive or unreasonable amount from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing and testing of wells and in furnishing power for the production of wells.

(d) "Person" means any natural person, corporation, association, partnership, receiver, trustee, executor, administrator, guardian, fiduciary, or other representatives of any kind, and includes any government or any political subdivision of any agency thereof. The masculine gender, in referring to a person, includes the feminine and the neuter genders.

(e) "Oil" means crude petroleum oil and all other hydrocarbons, regardless of gravity, that are produced in liquid form by ordinary production methods, but does not include liquid hydrocarbons that were originally in a gaseous phase in the reservoir.

(f) "Gas" means all natural gas and all other fluid hydrocarbons not hereinabove defined as oil, including condensate because it originally was in the gaseous phase in the reservoir.

(g) "Condensate" means liquid hydrocarbons that were originally in the gaseous phase in the reservoir.

(h) "Pool" means an underground reservoir containing a common accumulation of oil or gas or both; each zone of a structure that is completely separated from any other zone in the same structure is a pool.

(i) "Field" means the general area underlaid by one or more pools.

(j) "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas that he produces therefrom, either for himself or for himself and others.

(k) "Producer" means the owner of a well or wells capable of producing oil or gas or both.

(l) "Just and equitable share of the production" means, as to each person, that part of the production from the pool that is substantially in the proportion that the amount of recoverable oil or gas or both in the developed area of his tract or tracts in the pool bears to the recoverable oil or gas or both in the total of the developed areas in the pool.

(m) "Developed area" means a spacing unit on which a well has been completed that is capable of producing oil or gas, or the acreage that is otherwise attributed to a well by the commission.

(n) "Correlative rights" means the owners' or producers' just and equitable share in a pool.

(o) "Oil and gas" means oil or gas or both.

(p) The use of the plural includes the singular, and the use of the singular includes the plural. [1963, ch. 148, § 4, p. 433.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

**47-319. Land subject to act — Authority of commission.** — (a) This act shall apply to all lands located in the state, however owned, including any lands owned or administered by any government or any agency or political subdivision thereof, over which the state under its police power, has jurisdiction.

(b) The commission is authorized and it is its duty to prevent waste of oil and gas and to protect correlative rights, and otherwise to administer and enforce this act. It has jurisdiction over all persons and property necessary



for that purpose. In the event of a conflict, the duty to prevent waste is paramount.

(c) The commission is authorized to make such investigations as it deems proper to determine whether action by the commission in discharging its duties is necessary.

(d) Without limiting its general authority, the commission shall have the specific authority:

To require:

(1) identification of ownership of oil or gas wells, producing leases, tanks, plants, structures, and facilities for the transportation or refining of oil and gas;

(2) the taking and preservation of samples and the making and filing with the commission of true and correct copies of well logs and directional surveys both in form and content as prescribed by the commission; provided, however, that logs of exploratory or wildcat wells marked confidential shall be subject to disclosure according to chapter 3, title 9, Idaho Code. And provided further, that after four (4) months from the effective date of this act, the commission may require the owner of a well theretofore drilled for oil or gas to file within four (4) months of such order a true and correct copy of the log or logs of such well;

(3) the drilling, casing, operation and plugging of wells in such manner as to prevent (a) the escape of oil or gas out of one (1) pool into another, (b) the detrimental intrusion of water into an oil or gas pool that is avoidable by efficient operations, (c) the pollution of fresh water supplies by oil, gas, or salt water, (d) blow-outs, cavings, seepages, and fires, and (e) waste as hereinabove defined;

(4) the taking of tests of oil or gas wells;

(5) the furnishing of a reasonable performance bond with good and sufficient surety, conditioned upon the performance of the duty to comply with the requirements of this law and the regulations of the commission with respect to the drilling, maintaining, operating and plugging of each well drilled for oil or gas;

(6) that the production from wells be separated into gaseous and liquid hydrocarbons, and that each be measured by means and upon standards that may be prescribed by the commission;

(7) that wells not be operated with inefficient gas-oil or water-oil ratios, and to fix these ratios, and to limit production from wells with inefficient gas-oil or water-oil ratios;

(8) metering or other measuring of oil, gas, or product;

(9) that every person who produces oil or gas in the state keep and maintain for a period of five (5) years complete and accurate records of the quantities thereof, which records, or certified copies thereof, shall be available for examination by the commission or its agents at all reasonable times within said period, and that every such person file with the commission such reasonable reports as it may prescribe with respect to such oil or gas production;

(10) the filing of reports of plats with the commission that it may prescribe.

To regulate:

- (1) the drilling and plugging of wells and all other operations for the production of oil or gas;
- (2) the shooting and treatment of wells;
- (3) the spacing or locating of wells;
- (4) operations to increase ultimate recovery, such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into a producing formation; and
- (5) the disposal of salt water and oil-field wastes. To classify and reclassify pools as oil, gas, or condensate pools, or wells as oil, gas, or condensate wells. To make and enforce rules, regulations, and orders reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act. [1963, ch. 148, § 5, p. 433; am. 1990, ch. 213, § 63, p. 480.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

Sections 62 and 64 of S.L. 1990, ch. 213 are compiled as §§ 42-4010 and 47-1314, respectively.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**Sec. to sec. ref.** This section is referred to in § 47-328.

**Collateral References.** 38 Am. Jur. 2d, Gas and Oil, §§ 90-94, 142-145.

16A C.J.S., Constitutional Law, § 506.

The constitutionality of statute controlling exploitation or waste of oil and gas. 78 A.L.R. 834.

Construction and effect of statutes regulating production of oil or gas in manner or under conditions constituting waste. 86 A.L.R. 431.

Oil and gas tanks, pipes and pipelines, and apparatus and accessories thereof as constituting attractive nuisance. 23 A.L.R.2d 1157.

Grant, lease, exception, or reservation of oil and/or gas rights as including oil shale. 61 A.L.R.3d 1109.

**47-320. Permit to drill.** — It shall be unlawful to commence operations for the drilling of a well for oil or gas without first giving notice to the commission of intention to drill and without first obtaining a permit from the commission under such rules and regulations as may be reasonably prescribed by the commission and by paying to the commission a filing and service fee of one hundred dollars (\$100) for such permit, which shall be remitted to the state treasurer for deposit in the oil and gas conservation fund and shall be used exclusively to pay the costs and expenses incurred in connection with the administration and enforcement of this act. No permit may be issued by the commission until the commission shall notify the director of the department of water resources and said director shall have fifteen (15) days from the date of receipt of such notification from the commission to recommend conditions he believes necessary to protect fresh water supplies.

Upon issuance of any permit, a copy thereof, including any limitations, conditions, controls, rules or regulations attached thereto for the protection of fresh water supplies as required in section 47-319, Idaho Code, shall be forwarded to the director of the department of water resources. [1963, ch. 148, § 6, p. 433; am. 1973, ch. 255, § 1, p. 506; am. 1974, ch. 17, § 31, p. 308.]



**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

Section 30 of S.L. 1974, ch. 17, is compiled as § 47-317.

**Collateral References.** 58 C.J.S., Mines and Minerals, §§ 349-356.

**47-321. Spacing units.** — (a) The commission shall promptly establish spacing units for each pool except in those pools that have been developed to such an extent that it would be impracticable or unreasonable to establish spacing units at the existing stage of development.

(b) An order establishing spacing units shall specify the size and shape of the units, which shall be such as will, in the opinion of the commission, result in the efficient and economical development of the pool as a whole. The size of the spacing units shall not be smaller than the maximum area that can be efficiently and economically drained by one (1) well; provided, that if, at the time of a hearing to establish spacing units there is not sufficient evidence from which to determine the area that can be efficiently and economically drained by one (1) well, the commission may make an order establishing temporary spacing units for the orderly development of the pool pending the obtaining of the information required to determine what the ultimate spacing should be.

(c) Except where circumstances reasonably require, spacing units shall be of approximately uniform size and shape for the entire pool. The commission may establish spacing units of different sizes or shapes for different parts of a pool or may grant exceptions to the size or shape of any spacing unit or units or may change the sizes or shape of one or more existing spacing units.

(d) An order establishing spacing units shall direct that no more than one well shall be drilled to and produced from the common source of supply on any unit, and shall specify the location for the drilling of a well thereon, in accordance with a reasonably uniform spacing pattern, with necessary exceptions for wells drilled or drilling at the time of the filing of the application. If the commission finds that a well drilled at the prescribed location would not be likely to produce in paying quantities, or that surface conditions would substantially add to the burden or hazard of drilling such well, or for other good cause shown, the commission is authorized to make an order permitting the well to be drilled at a location other than that prescribed by such spacing order. Application for an exception shall be filed with the director of the Idaho department of lands and may be granted by him where it is shown that good cause for such exception exists and that consent to such exception has been given by the owners of all drilling units directly or diagonally offsetting the drilling unit for which an exception is requested, and, as to the lands upon which drilling units have not been established, by the owners of those lands which would be included in directly or diagonally offsetting drilling units under said order, if said order were extended to include such additional lands. Where an exception is not granted by the director or where an objection to the action of said director is filed with the commission within ten (10) days after he has granted or denied the application no well shall be drilled on said drilling unit except in accordance with the order establishing drilling units, unless and until the

commission shall, after notice and hearing upon the application, grant such exception.

(e) An order establishing spacing units for a pool shall cover all lands determined or believed to be underlaid by such pool, and may be modified by the commission from time to time to include additional lands determined to be underlaid by such pool or to exclude lands determined not to be underlaid by such pool.

(f) An order establishing spacing units may be modified by the commission to change the size or shape of one or more spacing units, or to permit the drilling of additional wells on a reasonably uniform pattern.

(g) Upon the filing of an application to establish spacing units, no additional well shall be commenced for production from the pool until the order establishing spacing units has been made, unless the commencement of the well is authorized by order of the commission. [1963, ch. 148, § 7, p. 433; am. 1974, ch. 17, § 32, p. 308.]

**Compiler's notes.** Section 33 of S.L. 1974, ch. 17 is compiled as § 47-324.

**47-322. Integration of tracts — Orders of commission.** — (a) When two (2) or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of a spacing unit, the interested persons may integrate their tracts or interests for the development and operation of the spacing unit. In the absence of voluntary integration, the commission, upon the application of any interested person, shall make an order integrating all tracts or interests in the spacing unit for the development and operation thereof and for the sharing of production therefrom. The commission, as a part of the order establishing a spacing unit or units, may prescribe the terms and conditions upon which the royalty interests in the unit or units shall, in the absence of voluntary agreement, be deemed to be integrated without the necessity of a subsequent separate order integrating the royalty interests. Each such integration order shall be upon terms and conditions that are just and reasonable.

(b) All operations, including, but not limited to, the commencement, drilling, or operation of a well upon any portion of a spacing unit for which an integration order has been entered, shall be deemed for all purposes the conduct of such operations upon each separately owned tract in the spacing unit by the several owners thereof. That portion of the production allocated to a separately owned tract included in a spacing unit shall, when produced, be deemed, for all purposes, to have been actually produced from such tract by a well drilled thereon.

(c) Each such integration order shall authorize the drilling, equipping, and operation, or operation, of a well on the spacing unit; shall provide who may drill and operate the well; shall prescribe the time and manner in which all the owners in the spacing unit may elect to participate therein; and shall make provision for the payment by all those who elect to participate therein; of the reasonable actual cost thereof, plus a reasonable charge for supervision and interest. If requested, each such integration order shall provide for one or more just and equitable alternatives whereby



an owner who does not elect to participate in the risk and cost of the drilling and operation, or operation, of a well may elect to surrender his leasehold interest to the participating owners on some reasonable basis and for a reasonable consideration which, if not agreed upon, shall be determined by the commission, or may elect to participate in the drilling and operation, or operation, of the well, on a limited or carried basis upon terms and conditions determined by the commission to be just and reasonable. If one or more of the owners shall drill, equip, and operate, or operate, or pay the costs of drilling, equipping, and operating, or operating, a well for the benefit of another person as provided for in an order of integration, then such owners or owner shall be entitled to the share of production from the spacing unit accruing to the interest of such other person, exclusive of a royalty not to exceed one eighth ( $\frac{1}{8}$ ) of the production, until the market value of such other person's share of the production, exclusive of such royalty, equals the sums payable by or charged to the interest of such other person. If there is a dispute as to the costs of drilling, equipping, or operating a well, the commission shall determine such costs. In instances where a well is completed prior to the integration of interests in a spacing unit, the sharing of production shall be from the effective date of the integration, except that, in calculating costs, credit shall be given for the value of the owner's share of any prior production from the well. [1963, ch. 148, § 8, p. 433.]

**47-323. Approval of agreements by commission — Defense to litigation.** — An agreement for the unit or cooperative development or operation of a field, pool, or part thereof, may be submitted to the commission for approval as being in the public interest or reasonably necessary to prevent waste or protect correlative rights. Such approval shall constitute a complete defense to any suit charging violation of any statute of the state relating to trusts and monopolies on account thereof or on account of operations conducted pursuant thereto. The failure to submit such an agreement to the commission for approval shall not for that reason imply or constitute evidence that the agreement or operations conducted pursuant thereto are in violation of laws relating to trusts and monopolies. [1963, ch. 148, § 9, p. 433.]

**47-324. Rules for commission.** — (a) The commission may prescribe rules governing the procedure before it, subject to the provisions of the administrative procedure act, chapter 52, title 67, Idaho Code.

(b) In all cases where (1) there is an application for the entry of a pooling order or (2) there is an application for an exception from an established well spacing pattern or (3) a complaint is made by the commission or any party that any provision of this act, or any rule or order of the commission is being violated, notice of the hearing to be held on such application or complaint shall be served on the interested parties in the same manner as is provided in the rules of civil procedure for the service of summons in civil actions.

(c) The commission may act upon its own motion, or upon the petition of any interested person. On the filing of a petition for a hearing concerning any matter within the jurisdiction of the commission, it shall promptly fix a

date for a hearing thereon and shall cause notice of the hearing to be given. The hearing shall be held without undue delay after the filing of the petition. Proceedings before the commission and judicial review of actions taken by the commission pursuant thereto shall be governed by the provisions of chapter 52, title 67, Idaho Code. Any person affected by an order of the commission shall have the right at any time to apply to the commission to repeal, amend, modify, or supplement the same. [1963, ch. 148, § 10, p. 433; am. 1974, ch. 17, § 33, p. 308; am. 1981, ch. 247, § 1, p. 494; am. 1993, ch. 216, § 42, p. 587.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

Sections 32 and 34 of S.L. 1974, ch. 17, are compiled as §§ 47-321 and 47-1317.

Sections 41 and 43 of S.L. 1993, ch. 216 are compiled as §§ 42-4012 and 47-718, respectively.

Section 75 of S.L. 1974, ch. 17, provided that the act should take effect on and after July 1, 1974.

**Cross ref.** Service of summons, I.R.C.P., Rules 4(a)-4(i).

**47-325. Powers of commission — Witnesses — Penalty.** — (a) The commission shall have the power to summon witnesses, to administer oaths, and to require the production of records, books, and documents for examination at any hearing or investigation conducted by it.

(b) In case of failure or refusal on the part of any person to comply with a subpoena issued by the commission, or in case of refusal of any witness to testify as to any matter regarding which he may be interrogated, any district court in the state, upon the application of the commission, may in term time or vacation issue an attachment for such person and compel him to comply with such subpoena, and to attend before the commission and produce such records, books, and documents for examination, and to give his testimony. Such court shall have the power to punish for contempt as in the case of disobedience to a like subpoena issued by the court, or for refusal to testify therein.

(c) Whenever it shall appear that any person is violating or threatening to violate any provision of this act or any rule, regulation, or order made hereunder, the commission shall bring suit in the name of the state against such person in the district court in the county of the residence of the defendant, or in the county of the residence of any defendant, if there be more than one defendant, or in the county where the violation is alleged to have occurred, to restrain such person from continuing such violation or from carrying out the threat of violation. In such suit, the court may grant injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions.

(d) Nothing in this act, and no suit by or against the commission, and no violation charged or asserted against any person under any provisions of this act, or any rule, regulation or order issued hereunder, shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any provision of this act, or any rule, regulation, or order issued thereunder. Any person so damaged by the violation may sue for and recover such damages as he otherwise may be entitled to receive. In the event the commission shall fail to bring suit to



enjoin any actual or threatened violation of this act, or of any rule, regulation or order made hereunder, then any person or party in interest adversely affected and who has, ten (10) days or more prior thereto, notified the commission in writing of such violation or threat thereof and has requested the commission to sue, may, to prevent any or further violation, bring suit for that purpose in the district court of any county in which the commission could have brought suit. If, in such suit, the court holds that injunctive relief should be granted, then the commission shall be made a party and shall be substituted for the person who brought the suit, and the injunction shall be issued as if the commission had at all times been the complaining party. [1963, ch. 148, § 11, p. 433.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

**47-326. Actions against the commission — Appeals — Falsification of records — Limitation of actions.** — (a) Any person adversely affected by any rule, regulation or order made or issued under this act, may within ninety (90) days after the entry thereof bring a civil suit or action against the commission in the district court of Ada county, or in the district court of the county in which the complaining person resides, or in the U.S. district court for Idaho (if it otherwise has jurisdiction), and not elsewhere, to test the validity of any provision of this act, or rule, regulation or order, or to secure an injunction or to obtain other appropriate relief, including all rights of appeal.

(b) An action or appeal involving any provision of this act, or a rule, regulation or order shall be determined as expeditiously as feasible. The trial court shall determine the issues on both questions of law and fact and shall affirm or set aside such rule, regulation or order, or remand the cause to the commission for further proceedings. Such court is hereby authorized to enjoin permanently the enforcement by the commission of this act, or any part thereof, or any act done or threatened thereunder, if the plaintiff shall show that as to him the act or conduct complained of is unreasonable, unjust, arbitrary or capricious, or violates any constitutional right of the plaintiff or if the plaintiff shows that the act complained of does not constitute or result in waste, or does not in a reasonable manner accomplish an end that is the subject matter of this act.

(c) Any person who, for the purpose of evading this act or any rule, regulation or order of the commission shall make or cause to be made any false entry in any report, record, account, or memorandum required by this act, or by any such rule, regulation or order, or shall omit, or cause to be omitted, from any such report, record, account, or memorandum, full, true and correct entries as required by this act, or by any such rule, regulation or order, or shall remove from this state or destroy, mutilate, alter or falsify any such record, account, or memorandum, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than five thousand dollars (\$5,000) or imprisonment for a term not exceeding six (6) months, or to both such fine and imprisonment.

(d) No suit, action or other proceeding based upon a violation of this act or any rule, regulation or order of the commission hereunder shall be commenced or maintained unless same shall have been commenced within one (1) year from date of the alleged violation. [1963, ch. 148, § 12, p. 433.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

The words enclosed in parentheses in subsection (a) so appeared in the law as enacted.

**47-327. Lands subject to this act.** — This act shall apply to all lands in the state of Idaho lawfully subject to its police power, and shall apply to lands of the United States, or to lands subject to the jurisdiction of the United States over which the state of Idaho has police power, except to the degree that it is inharmonious with the uses, activities or regulations of the United States, and furthermore, the same shall apply to any lands committed to a unit agreement approved by the secretary of the interior or his duly authorized representative, except that the commission may, with respect to such unit agreement, suspend the application of this act or any part of this act so long as the conservation of oil and gas and the prevention of waste as in this act provided is accomplished under such unit agreements, but such suspension shall not relieve any operator from making such reports as may be required by the commission with respect to operations under any such unit agreement. [1963, ch. 148, § 13, p. 433.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.

**47-328. Act not construed to restrict production.** — It is not the intent or purpose of this law to require the proration or distribution or the production of oil and gas among the fields of Idaho on the basis of market demand. This act shall never be construed to require, permit, or authorize the commission or any court to make, enter, or enforce any order, rule, regulation or judgment requiring restriction of production of any pool or of any well (except as provided in section 47-319 hereof) to an amount less than the well or pool can produce without waste in accordance with sound engineering practices. [1963, ch. 148, § 14, p. 433.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

For words "this act" see compiler's note, § 47-316.

Section 15 of S.L. 1963, ch. 148 provided "If any section, subsection, sentence, clause, phrase or word of this Act is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining

portion of this Act. The legislature hereby declares that it would have passed this Act and each division, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or words might be adjudged to be unconstitutional or for any other reason invalid."

**47-329. Title.** — This act may be cited as the Oil and Gas Conservation Act. [1963, ch. 148, § 16, p. 433.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-316.



**47-330. Oil and gas conservation fund created — Tax.** — For the purpose of paying the expenses of administration of this act, there is hereby established a special fund to be known as the "Oil and Gas Conservation Fund", and there is hereby levied and imposed on all oil and gas produced, saved and sold or transported from the premises in Idaho where produced a tax not to exceed five (5) mills per barrel of oil or per 50,000 cubic feet of gas. The commission shall by order fix the amount of such charge in the first instance and shall thereafter at its first meeting after the commencement of its fiscal year, determine such charge for the ensuing year as in its judgment the expenses chargeable against the oil and gas conservation fund may require; provided that the amounts fixed by the commission shall not exceed the limit hereinabove prescribed. It shall be the duty of the commission to enforce collection of such assessments and to make such rules and regulations as may be necessary to enforce such charges. All money so collected shall be remitted to the state treasurer for deposit in the oil and gas conservation fund, which fund is hereby created in the office of the state treasurer of the state of Idaho, and is hereby appropriated and made available for defraying the expenses of the commission in carrying out the provisions of this act. The commission shall audit all bills for salaries and expenses incurred in the enforcement of this act that may be payable from the oil and gas conservation fund which shall be audited, allowed and paid as to the claims against the state. The persons owning an interest (working interest, royalty interest, payments out of production, or any other interest), in the oil and gas, or in the proceeds thereof, subject to the charge hereinabove provided for, shall be liable for such charge in proportion to their ownership at the time of production. The charge so assessed and fixed shall be payable quarterly, and the sum so due shall be remitted to the commission, on or before the twenty-fifth (25th) of the next month following the preceding quarter in which the charge accrued, by the producer on behalf of himself and all other interested persons; provided, however, in the event of a sale of oil or gas within this state said charge may be payable by the purchaser thereof. Any such charge not paid within the time herein specified shall bear interest at the rate of one per cent (1%) per month from the date of delinquency until paid, and such charge, together with the interest, shall be a lien upon the oil or gas against which the same is levied and assessed, or, if the same is not available for a lien, upon any oil or gas owned or held by the persons responsible for paying said charge. The person remitting the charge, as herein provided, is hereby empowered and required to deduct from any amounts due the persons owning an interest in the oil and gas, or in the proceeds thereof, at the time of production a proportionate amount of such charge before making payment to such persons. This section shall apply to all lands in the state of Idaho, anything in this act to the contrary notwithstanding; provided, however, there shall be exempted from the charge hereinabove levied and assessed the following, to wit:

(a) The interest of the United States of America and the interest of the state of Idaho and the political subdivisions thereof in any oil or gas or in the proceeds thereof.

(b) The interest of any Indian or Indian tribe in any oil or gas or the proceeds thereof, produced from lands subject to the supervision of the United States.

(c) Oil and gas used in producing operations or for repressuring or recycling purposes. [1963, ch. 148, § 17, p. 433.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

For words "this act" see compiler's note, § 47-316.

Section 18 of S.L. 1963, ch. 148 repealed

sections 47-301, 47-302, 47-303, 47-304, 47-305, 47-308, 47-309, 47-310, 47-311, 47-312, 47-313, and 47-314, Idaho Code.

Section 19 of S.L. 1963, ch. 148 declared an emergency. Approved March 19, 1963.

**47-331. Additional tax on oil and gas produced.** — (1) In addition to the tax imposed by section 47-330, Idaho Code, there is hereby levied and imposed on all oil or gas produced, saved and sold, or transported from the premises in Idaho where produced, a tax equal to two percent (2%) of the market value of the oil or gas produced at the site of production. All moneys collected from the tax shall be remitted to the state treasurer for deposit in the oil and gas conservation account in the dedicated fund.

(2) The persons owning an interest (working interest, royalty interest, payments out of production, or any other interest), in the oil or gas, or in the proceeds thereof, subject to the charge hereinabove provided for, shall be liable for such tax in proportion to their ownership at the time of production. The tax so assessed and fixed shall be payable quarterly, and the sum so due shall be remitted to the commission, on or before the 25th of the next month following the preceding quarter in which the tax accrued, by the producer on behalf of himself and all other interested persons; provided, however, in the event of a sale of oil or gas within this state said tax may be payable by the purchaser thereof. Any tax not paid within the time herein specified shall bear interest at the rate of one percent (1%) per month from the date of delinquency until paid, and the tax, together with the interest, shall be a lien upon all the property and rights to property, whether real or personal, belonging to the persons responsible for paying the tax. The person remitting the tax, as herein provided, is hereby empowered and required to deduct from any amounts due the persons owning an interest in the oil or gas, or in the proceeds thereof, at the time of production a proportionate amount of the tax before making payment to such persons.

(3) The tax imposed by this section shall apply to oil or gas produced from any lands in the state of Idaho; but the tax shall not be imposed upon or collected from oil or gas used in producing operations or for repressuring or recycling purposes.

(4) To the extent that such sections are not in conflict with the provisions of this act, the deficiency in tax and notice of deficiency as well as the collection and enforcement procedures provided by the Idaho income tax act, sections 63-3038, 63-3039, 63-3040, 63-3042 through 63-3065A, 63-3068, 63-3071 and 63-3075 through 63-3078, Idaho Code, shall apply and be available to the state tax commission for enforcement of the provisions of this act and the assessment and collection of any amounts due. Said sections shall for this purpose be considered a part of this act and wherever liens or



any other proceedings are defined as income tax liens or proceedings they shall, when applied in enforcement or collection under this act, be described as an oil and gas tax lien or proceeding.

The state tax commission may be made a party defendant in an action at law or in equity by any person aggrieved by the unlawful seizure or sale of his property, or in any suit for refund or to recover an overpayment, but only the state of Idaho shall be responsible for any final judgment secured against the state tax commission, and said judgment or any other amount erroneously or illegally collected shall be paid or satisfied out of the state refund account created by section 63-3067, Idaho Code. [I.C., § 47-331, as added by 1981, ch. 141, § 1, p. 243; am. 1983, ch. 118, § 1, p. 261.]

**Compiler's notes.** The words in parentheses so appeared in the law as enacted.

**47-332. Distribution of revenues.** — (1) It shall be the duty of the state tax commission to enforce collection of the tax imposed by section 47-331, Idaho Code, and to make such rules and regulations as may be necessary, pursuant to the provisions of chapter 52, title 67, Idaho Code.

(2) An amount equal to five percent (5%) of the amount deposited in the oil and gas conservation account, but not in excess of fifty thousand dollars (\$50,000) shall be retained in this account as an "oil and gas production tax refund account" for the purpose of repaying overpayments made under this act and for the purpose of paying any other erroneous receipts illegally assessed or collected, penalties collected without authority and taxes and other amounts unjustly assessed, and such additional amounts as the tax commission may be required to pay in conjunction with payments of such refunds. There is hereby appropriated from this account so much thereof as may be necessary for the payment of the refunds as provided herein.

(3) An amount of money necessary to pay the costs incurred by the state tax commission in conjunction with the administration and enforcement of this act shall be appropriated annually from the oil and gas conservation account to the state tax commission.

(4) The balance remaining in the oil and gas conservation account shall be distributed no less frequently than quarterly, based upon collections from the previous quarter, as follows:

(a) Fourteen percent (14%) is hereby appropriated and shall be paid to the current expense fund of the county from which the oil or gas was produced;

(b) Fourteen percent (14%) is hereby appropriated and shall be paid to the cities within the county from which the oil or gas was produced. Such funds shall be distributed to each city based upon the proportion that the city's population bears to the total population of all of the cities within the county;

(c) Fourteen percent (14%) is hereby appropriated and shall be paid to the public school income fund;

(d) Eight percent (8%) shall be transferred to the local economic development account which is hereby created in the agency asset fund to provide assistance in those counties which are experiencing a severe

economic hardship due to the cutback or closure of business and industry associated with oil or gas production; and  
 (e) Fifty percent (50%) shall be transferred to the state general account. [I.C., § 47-332, as added by 1983, ch. 118, § 2, p. 261.]

**Compiler's notes.** The words "this act" refer to S.L. 1983, ch. 118, which is compiled as §§ 47-331 and 47-332.

## CHAPTER 4

### GENERAL SAFETY REGULATIONS

#### SECTION.

47-401 — 47-431. [Repealed.]

### 47-401 — 47-431. General safety regulations for mines. [Repealed.]

**Compiler's notes.** These sections, which comprised S.L. 1909, p. 266, §§ 1-31; am. 1915, ch. 46, § 1; reen. C.L. §§ 229:1-229:31; C.S., §§ 5485-5515; am. 1923, ch. 131, § 1, p. 192; I.C.A., §§ 46-401 — 46-431; am. 1963, ch. 18, §§ 1-10, p. 154, were repealed by S.L. 1969, ch. 35, § 1 as of October 1, 1969 which

provided that the mine inspector was directed to prepare and take steps necessary to adopt regulations as might be necessary to carry on his duties pertaining to mine safety and health inspection so that said regulations might become effective upon such date of repeal.

## CHAPTER 5

### DUST PREVENTION

#### SECTION.

47-501 — 47-504. [Repealed.]

### 47-501 — 47-504. Dust prevention — Procedures — Penalty for violation. [Repealed.]

**Compiler's notes.** These sections, which comprised S.L. 1917, ch. 86, §§ 1-4, p. 302; reen. C.L. §§ 229:32-229:35; C.S., §§ 5516-5519; I.C.A., §§ 46-501 — 46-504; am. 1963, ch. 18, §§ 11, 12, p. 154, were repealed by S.L. 1969, ch. 35, § 1 as of October 1, 1969 which provided that the mine inspector was directed

to prepare and take steps necessary to adopt regulations as might be necessary to carry on his duties pertaining to mine safety and health inspection so that said regulations might become effective upon such date of repeal.

## CHAPTER 6

### LOCATION OF MINING CLAIMS

#### SECTION.

47-601. Mining claim locations authorized.  
 47-602. Method of locating mining claim.  
 47-603, 47-603A. [Repealed.]  
 47-604. Notice must be recorded.  
 47-605. Record of additional certificate.  
 47-606. Affidavit of performance of labor — Notice of acceptance of waiver, suspension or extension — Fees — Effect as evidence.

#### SECTION.

47-607. Location of abandoned claim.  
 47-608. Notice must claim only one location.  
 47-609. Security to surface owners — Injunction.  
 47-610. [Repealed.]  
 47-611. Affidavit of locators.  
 47-612. Manner of recording notices.  
 47-613. Certain surveys may qualify as annual labor.



## SECTION.

47-614. Definitions.

47-615 — 47-617. [Repealed.]

47-618. Lode and placer claims — Official patent survey as labor on improvement.

## SECTION.

47-619. Lode and placer claims — Official patent survey as credit on annual assessment work.

**47-601. Mining claim locations authorized.** — Persons are authorized to locate mining claims upon that public domain in the state of Idaho which is open to location under the mining laws of the United States. The location of a mining claim shall be made by posting notice of location and by marking the boundaries as provided in section 47-602 of this chapter. [I.C., § 47-601, as added by 1970, ch. 92, § 2, p. 227.]

**Compiler's notes.** Former § 47-601 which comprised S.L. 1881, p. 262, § 1; R.S., § 3100; am. 1895, p. 25, § 1; reen. 1899, p. 237, § 1; reen. R.C., § 3206; C.L., § 3206; C.S., § 5520; I.C.A., § 46-601, was repealed by S.L. 1970, ch. 92, § 1.

**Cross ref.** Mechanics' and materialmen's liens on mining claims, § 45-501.

Mining employers, statement required, § 44-501.

Mining partnerships, § 53-401.

**Cited in:** Clearwater Minerals Corp. v. Presnell, 111 Idaho 945, 729 P.2d 420 (Ct. App. 1986).

**Federal Standards.**

Although standards for the location of mining claims have been set by federal statute (30 U.S.C. § 26), the state can exercise its police power to impose additional nonconflicting requirements. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Discovery unnecessary.

Excessive location.

Seniority of discovery.

**Discovery Unnecessary.**

It was not essential that the locator of a mining claim be the first discoverer of a vein or lode in order to make a valid location, and if it appeared the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he could base his location upon it and thus avoid the necessity of making a discovery for himself. *Allen v. Laudahn*, 59 Idaho 207, 81 P.2d 734 (1938).

**Excessive Location.**

Where the exterior boundaries of a mineral location included such an unreasonably excessive area that such boundary lines could not be said to impart notice to prospector of mineral location or discovery within reasonable distance of a lawful claim as located under former statute, such location would be held

void. *Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho 224, 109 P. 846, 28 L.R.A. (n.s.) 1029 (1910).

**Seniority of Discovery.**

Where one miner had discovered what he considered mineral indications and deposits, and had followed up the discovery by staking a claim, and doing the necessary location work, and another miner came along and made a discovery and located a part or all of the same ground covered by the former location, and thereupon went into court and contested the senior location, and in order to sustain that contention, showed that the ground did, in fact, contain valuable mineral deposits and at the same time contended that the senior locator had not made a mineral discovery, the courts would not examine the evidence of the senior discovery with very great strictness. *Allen v. Laudahn*, 59 Idaho 207, 81 P.2d 734 (1938).

**Collateral References.** 54 Am. Jur. 2d, Mines and Minerals, §§ 33-56.

58 C.J.S., Mines and Minerals, §§ 6-17.

**47-602. Method of locating mining claim.** — The locator of a mining claim must at the time of making his location designate his claim by posting at one (1) corner of the claim his notice of location in writing in which there shall be stated:

1. The name of the locator or locators.

2. The name of the claim and whether located as a lode mining claim or as a placer mining claim.

3. The date of the location and the mining district, if any, and the county in which the claim is located.

4. The directions and distances which describe the claim.

5. The direction and distance from the corner where notice is posted to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the site of the claim.

Before recording his notice of location, the locator must mark the boundaries of his mining claim by placing at each corner or angle of the claim a substantial monument or a post at least four (4) feet in height and four (4) inches square or in diameter. Each post and monument shall be marked with the name of the claim, the position or number of the corner or angle and the direction of the boundary lines. The locator shall mark the boundary lines so that they can be readily traced. Where it is impracticable to place a monument or post in its true position, a witness monument shall be erected and marked to indicate the true position of the corner or angle. [I.C., § 47-602, as added by 1970, ch. 92, § 4, p. 227.]

**Compiler's notes.** Former § 47-602 which comprised S.L. 1881, p. 262, §§ 2, 3; R.S., § 3101; am. 1895, p. 25, § 2; reen. 1899, p. 237, § 2; am. 1899, p. 440, § 1; reen. R.C., § 3207; C.L., § 3207; C.S., § 5521; I.C.A., § 46-602, was repealed by S.L. 1970, ch. 92, § 3.

**Cited in:** *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987); *Golden Condor, Inc. v. Bell*, 112 Idaho 1086, 739 P.2d 385 (1987).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Actual notice.  
Adverse possession.  
Conflicting claims.  
Construction.  
Decisions under federal statutes.  
Duplication of names.  
Excessive location.  
Location by agent.  
Marking a mandatory requirement.  
Marking exterior boundaries.  
Necessity of discovery.  
Notice held insufficient.  
Notice held sufficient.  
Sufficiency of notice in general.  
Valid Location — Effect.

##### Actual Notice.

If locator had actual notice that ground in controversy had been located, as well as constructive notice by an examination of recorded notice, no technicalities would be resorted to to sustain his relocation of the same ground. *Flynn Group Mining Co. v. Murphy*, 18 Idaho 266, 109 P. 851, 138 Am. St. 201 (1910).

Object of former statute was to give notice of location of claim, and when subsequent

locator had actual knowledge of location of claim, he was not misled by deficient description and could not take advantage of it. *Sellers v. Taylor*, 48 Idaho 116, 279 P. 617 (1929).

##### Adverse Possession.

Under U.S.R.S., § 2332 (U.S. Code, tit. 30, § 38) claimant to mineral lands, who had been in open, exclusive adverse possession of a claim for a continuous period equal to that required by local statute of limitations governing adverse possession of real estate, was relieved of necessity of making proof of posting and recording a notice of location and such other proofs as were usually furnished by county recorder. *Humphreys v. Idaho Gold Mines Dev. Co.*, 21 Idaho 126, 120 P. 823 (1912).

##### Conflicting Claims.

Location and discovery on land withdrawn quoad hoc from public domain by valid and subsisting mining claim was absolutely void for purpose of founding contradictory right. *Swanson v. Sears*, 224 U.S. 180, 32 S. Ct. 455, 56 L. Ed. 721 (1912).

Since rights of conflicting locators to unpatented mining claim were subject to paramount title of United States, they could be



subject of only possessory action and not action to quiet title in true sense of that term. *Hedrick v. Lee*, 39 Idaho 42, 227 P. 27 (1924).

Complaint in actions of conflicting claims should have described same by metes and bounds or set forth location notices, but reference in complaint to location notices on file in office of county recorder saved it as against general demurrer. *Hedrick v. Lee*, 39 Idaho 42, 227 P. 27 (1924).

#### **Construction.**

Provisions of former section as to erecting monuments and placing thereon name of locator and claim were mandatory. *Buckeye Mining Co. v. Powers*, 43 Idaho 532, 257 P. 833 (1927).

#### **Decisions under Federal Statutes.**

Provisions of U.S. Code (9 U.S.C.), tit. 30, § 38 were intended to obviate necessity for proof of posting and recording notice of location in cases where claimant had been in actual, open, and exclusive possession for period equal to that prescribed by local statute of limitations, governing adverse possession of real estate. *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

Purchaser urging forfeiture of interests in unpatented mining claim had burden of showing strict compliance with 9 U.S.C., tit. 30, § 28. *Porter v. Jugovich*, 47 Idaho 682, 278 P. 219 (1929).

Locator of lode mining claim, who allowed his location to lapse by failure to perform required assessment work, could have made new location covering same ground. See U.S. Code (9 U.S.C.), tit. 30, § 28. *Sellers v. Taylor*, 48 Idaho 116, 279 P. 617 (1929).

#### **Duplication of Names.**

Under former section a claim had to be named, but there could have been many claims of the same name in the same county, and use of such mining claim name on the assessment roll and in a tax deed was insufficient to pass title. *Meneice v. Blackstone Mining Co.*, 63 Idaho 413, 121 P.2d 450 (1942).

#### **Excessive Location.**

Where, in locating claim, amount included was by mistake in excess of that allowed by law, excess could have been rejected and claim held good for remainder, unless it interfered with rights previously acquired. *Stemwinder Mining Co. v. Emma & Last Chance Consol. Mining Co.*, 149 U.S. 787, 13 S. Ct. 1052, 37 L. Ed. 960 (1892).

Extralateral rights were dependent on continuity of lode. See *Utah Consol. Mining Co. v. Utah Apex Mining Co.*, 277 F. 41 (8th Cir. 1921), cert. denied, 258 U.S. 619, 42 S. Ct. 272, 66 L. Ed. 794 (1922); *Utah Consol. Mining Co. v. Utah Apex Mining Co.*, 285 F. 249

(8th Cir. 1922), cert. denied, 261 U.S. 617, 43 S. Ct. 362, 67 L. Ed. 2d 829 (1923).

Where an excessive mineral location had been made through mistake, while locator was acting in good faith, location would be void only as to excess; but where locator had purposely included within his exterior boundaries an excessive area with fraudulent intent of holding entire area under one location, such location was void; or if made so large that the location could not be deemed result of innocent error or mistake, fraud would be presumed. *Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho 224, 109 P. 846, 28 L.R.A. (n.s.) 1029 (1910); *Flynn Group Mining Co. v. Murphy*, 18 Idaho 266, 109 P. 851, 138 Am. St. 201 (1910).

#### **Location by Agent.**

Agent for locator could do things required by former section in locating claim. *Dunlap v. Pattison*, 4 Idaho 473, 42 P. 504, 95 Am. St. 140 (1895).

#### **Marking a Mandatory Requirement.**

The former statutory enumeration of things to be done to make a valid location of a mining claim was specific; and the requirement that the location monument be marked with the name of the claim was mandatory. *Norrie v. Fleming*, 62 Idaho 381, 112 P.2d 482 (1941).

Whether notice and description of claim were sufficient to apprise other prospectors of its precise location was question of fact and not of law. *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

#### **Marking Exterior Boundaries.**

It took more than posting of a discovery notice to constitute a valid location. It was just as essential that exterior boundaries be marked. *Nicholls v. Lewis & Clark Mining Co.*, 18 Idaho 224, 109 P. 846, 28 L.R.A. (n.s.) 1029 (1910).

#### **Necessity of Discovery.**

Vein or lode should have been discovered before valid location could be made thereon; one could not locate quartz claim on porphyry, granite, limestone, or quartzite unless he had previously discovered vein or lode. *Ambergris Mining Co. v. Day*, 12 Idaho 108, 85 P. 109 (1906).

#### **Notice Held Insufficient.**

Location which was tied to a natural object or permanent monument, described as the mouth of Big Canyon, and which fixed the discovery stake at six hundred feet from such monument, without indicating direction from point of discovery, was void. *Clearwater Short-Line Ry. v. San Garde*, 7 Idaho 106, 61 P. 137 (1900).

Location notices placed on flat rock or in tobacco can on ground were held insufficient.

Buckeye Mining Co. v. Powers, 43 Idaho 532, 257 P. 833 (1927).

#### Notice Held Sufficient.

Location notice describing claim as "Commencing at this stake and notice which was situated about 300 feet in a northwesterly direction from the Minnesota mine; that it was an extension of the Red Jacket mine and running thence along the vein or lode in an easterly direction to a similar stake and notice," was sufficient. *Morrison v. Regan*, 8 Idaho 291, 67 P. 955 (1902).

Located mining claim was natural object or landmark, or fixed object which could be referred to in location notice. *Morrison v. Regan*, 8 Idaho 291, 67 P. 955 (1902); *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

Presumption was that claim named as monument in location notice existed, and burden of showing nonexistence was upon party attacking notice. *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

#### Sufficiency of Notice in General.

Location notice must have described claim by reference to some natural object or permanent monument which would identify claim and would furnish reasonable certainty that locus of claim had not been, and could not well be, changed; reference must have been such as would enable skilled engineer to identify claim without reference to contiguous claims, location of which were uncertain, and courses and distances from permanent monument to discovery stakes or corner stakes must have been stated with reasonable accuracy. *Brown v. Levan*, 4 Idaho 794, 46 P. 661 (1896).

Where location certificate contains reference to landmark, it should not have been declared insufficient upon mere inspection of certificate and in absence of evidence, unless it clearly failed to identify claim. *Morrison v. Regan*, 8 Idaho 291, 67 P. 955 (1902).

Where the location of mining claim was made in good faith, court would not hold locator to a very strict compliance with the law in respect to his location notice. If by any reasonable construction, in view of surrounding circumstances, language employed in description would impart notice to subsequent locators, it was sufficient. Natural objects or permanent monuments referred to in statutes could have been on ground located, or off. *Bismarck Mt. Gold Mining Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 P. 14 (1908);

*Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co.*, 17 Idaho 630, 107 P. 60 (1910); *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

Intent of prior law was to require locator to make his location so definite and certain that, from location notice and stakes and monuments on ground, limits and boundaries of the claim could have been readily ascertained, and so definite and certain as to have prevented changing or floating of claim. *Flynn Group Mining Co. v. Murphy*, 18 Idaho 266, 109 P. 851, 138 Am. St. 201 (1910).

Location notice was not required to describe exterior boundaries of claim. *Flynn Group Mining Co. v. Murphy*, 18 Idaho 266, 109 P. 851, 138 Am. St. 201 (1910).

Sufficiency of description of property or tie to a natural object or permanent monument was open to explanation by other evidence than notices to show whether or not property could have been definitely identified from such description. *Humphreys v. Idaho Gold Mines Dev. Co.*, 21 Idaho 126, 120 P. 823, 40 L.R.A. (n.s.) 817 (1912).

Description which was so erroneous as to be delusive and misleading rendered location void. *Swanson v. Koeninger*, 25 Idaho 361, 137 P. 891 (1913).

Location notices had to be placed upon monument in manner sufficiently conspicuous to be observed. *Buckeye Mining Co. v. Powers*, 43 Idaho 532, 257 P. 833 (1927).

#### Valid Location — Effect.

Valid location with continued compliance with law gave exclusive right to ground within lines. *Swanson v. Kettler*, 17 Idaho 321, 105 P. 1059, *aff'd*, 224 U.S. 180, 33 S. Ct. 455, 56 L. Ed. 721 (1909).

Right to follow vein on its dip beyond surface lines of lode location existed only when apex of such vein lay inside such lines. See U.S. Code (9 U.S.C.), tit. 30, § 26. *Stewart Mining Co. v. Ontario Mining Co.*, 237 U.S. 350, 35 S. Ct. 610, 59 L. Ed. 989 (1915).

Decision of state Supreme Court adverse to contentions of owner of lode mining claim founded upon apex and extra lateral rights provisions of former act did not rest upon nonfederal ground so as to defeat jurisdiction of Supreme Court of United States. See U.S. Code (9 U.S.C.), tit. 30, § 26. *Stewart Mining Co. v. Ontario Mining Co.*, 237 U.S. 350, 35 S. Ct. 610, 59 L. Ed. 989 (1915).

### 47-603, 47-603A. Shaft must be sunk — Relocation — Open cuts and drill holes in lieu of shaft. [Repealed.]

**Compiler's notes.** These sections, which comprised S.L. 1895, p. 25, § 3; reen. 1899, p.

237, § 3; reen. R.C., § 3208; C.L., § 3208; C.S., § 5522; I.C.A., § 46-603; I.C., § 47-



603A, as added by 1957, ch. 71, § 1, p. 118, were repealed by S.L. 1970, ch. 92, §§ 5, 6, respectively.

**47-604. Notice must be recorded.** — Within ninety (90) days after the location of the claim the locator or his assigns must file for record in the office of the county recorder of the county in which the claim is situated, a copy of his notice of location. Failure to file notice of location for record within ninety (90) days after location of the claim shall constitute an abandonment of the claim. [1895, p. 25, § 4; reen. 1899, p. 237, § 4; reen. R.C., § 3209; C.L., § 3209; C.S., § 5523; I.C.A., § 46-604; am. 1970, ch. 92, § 7, p. 92.]

**Cited in:** Bunker Chance Mining Co. v. Bex, 90 Idaho 47, 408 P.2d 170 (1965).

**Cross ref.** Notices of preemption claims to be recorded by county recorder, § 31-2402.

#### ANALYSIS

**Adverse possession.**

Notice is prima facie evidence.

#### **Adverse Possession.**

Under U.S.R.S., § 2332 (U.S. Code (9 U.S.C.), tit. 30, § 38), claimant to mineral lands who has been in adverse possession for continuous period equal to that required by local statute of limitations is relieved of necessity of making proof of recording a notice of location. *Humphreys v. Idaho Gold Mines Dev. Co.*, 21 Idaho 126, 120 P. 823, 40 L.R.A. (n.s.) 817 (1912).

It still remains for persons who assert claim by adverse possession to have mineral discovery and perform assessment work. They must also mark boundaries of claim so as to afford actual notice of extent of possession and exclude all adverse claimants for full period of statute. They must likewise maintain possession and occupancy during subsequent period

when adverse locator attempts to initiate right by locating claim. *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

Possession of unpatented mining claims is actual possession, not constructive possession. "Actual possession" means something more than mere compliance with requirements of assessment work. *Law v. Fowler*, 45 Idaho 1, 261 P. 667 (1927).

Adverse claimant of mining right must institute action within thirty days from filing adverse claim or within ninety days of first publication of notice, or court has no jurisdiction to pass upon his claim. See U.S. Code (9 U.S.C.), tit. 30, § 29. *Little v. Morris*, 48 Idaho 740, 284 P. 1029 (1930).

#### **Notice is Prima Facie Evidence.**

Location notice or certificate, when recorded, is prima facie evidence of all facts statute requires it to contain, and which are therein sufficiently set forth. *Bismarck Mt. Gold Mining Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 P. 14 (1908).

**Collateral References.** 53A Am. Jur. 2d, *Mines and Minerals*, §§ 45, 47.

58 C.J.S., *Mines and Minerals*, §§ 84, 99.

**47-605. Record of additional certificate.** — If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this chapter, such locator or his assigns may file an additional certificate subject to the conditions of this chapter, and to contain all that this chapter requires an original certificate to contain: provided, that such amended location does not interfere with the existing rights of others at the time when such amendment is made. [1895, p. 25, § 5; reen. 1899, p. 237, § 5; reen. R.C. & C.L., § 3210; C.S., § 5524; I.C.A., § 46-605.]

**Amended Locations.**

Amended location may be made by any one having authority to make same, and such authority need not be in writing. *Morrison v. Regan*, 8 Idaho 291, 67 P. 955 (1902).

Proviso of this section, that amended locations do not interfere with existing rights of others at time of amendment, applies only to changes of boundaries or to cases where part of an overlapping claim which has been abandoned is taken in, and does not apply to amended locations by which surface boundaries are not changed, or where no part of an overlapping claim is taken in. *Morrison v.*

*Regan*, 8 Idaho 291, 67 P. 955 (1902).

Amended certificate may cure a defective or erroneous original certificate and relates back to date of original certificate, unless such original is absolutely void, or where rights of others have intervened between date of original and amended locations. *Morrison v. Regan*, 8 Idaho 291, 67 P. 955 (1902).

Amended locations, where they do not interfere with existing rights, relate back to date of original locations. *Bismarck Mt. Gold Mining Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 P. 14 (1908).

**47-606. Affidavit of performance of labor — Notice of acceptance of waiver, suspension or extension — Fees — Effect as evidence. —** Within sixty (60) days after any time set or period allowed for the performance of labor, or making improvements upon any lode or placer claim, the person in whose behalf such work or improvement is performed or some person for him, must make and record an affidavit in substance as follows:

State of Idaho, county of ....., ss.

Before me, the subscriber, personally appeared ....., who being first duly sworn says, that at least .... dollars worth of work or improvements were performed or made upon .... claim, situate in .... mining district, County of ....., State of Idaho:

That such expenditure was made by, for, or at the expense of ....., owner of said claim, for the purpose of holding said claim; all stakes, monuments or trees marking boundaries of said claim are in proper place and position.

Subscribed and sworn to before me this .... day of ....., .....

The fee for administering the oath and recording the foregoing affidavit, when taken before any county recorder, shall be as provided by section 31-3205, Idaho Code.

Such affidavit, or a certified copy thereof in case the original is lost, shall be prima facie evidence of the performance of such labor. The failure to file such affidavit shall be considered prima facie evidence that such labor has not been done.

When the performance of annual labor upon any lode or placer claim is suspended, extended or waived by act of congress of the United States, and provision is therein made for filing or recording a notice, affidavit or statement by the claimant or other person for him, accepting the provisions of said act, then the same shall be filed as herein provided for affidavit of performance of annual labor, and the same fees shall be charged therefor and the same effect shall be given thereto, and the same presumptions shall arise therefrom as provided herein for said affidavit of performance of annual labor. [R.S., § 3101; am. 1899, p. 237, § 6; am. 1899, p. 440, § 2; reen. R.C., § 3211; am. 1913, ch. 72, § 1, p. 308; reen. C.L., § 3211; C.S., § 5525; I.C.A., § 46-606; am. 1945, ch. 114, § 1, p. 176; am. 1951, ch. 251, § 2, p. 540; am. 1957, ch. 171, § 1, p. 306; am. 1959, ch. 72, § 2, p. 157; am. 1970, ch. 92, § 8, p. 227; am. 1976, ch. 281, § 4, p. 962; am. 1982, ch. 207, § 1, p. 570; am. 2002, ch. 32, § 19, p. 46.]



**Compiler's notes.** Sections 1 and 4 of S.L. 1951, ch. 251 are compiled as §§ 31-3205 and 45-914, respectively.

Section 3 of S.L. 1951, ch. 251, formerly compiled as § 45-1106, was repealed by S.L. 1967, ch. 161, § 10-102.

Sections 1 and 4 of S.L. 1959, ch. 72 are compiled as §§ 31-3205 and 45-914, respectively.

Section 3 of S.L. 1959, ch. 72, formerly compiled as § 45-1106, was repealed by S.L. 1967, ch. 161, § 10-102.

Sections 3 and 5 of S.L. 1976, ch. 281, are compiled as §§ 31-3205 and 47-612, respectively.

Sections 18 and 20 of S.L. 2002, ch. 32, are compiled as §§ 45-519 and 47-611, respectively.

**Cross ref.** Official patent survey as development work, § 47-618; as assessment work, § 47-619.

**Cited in:** Clearwater Minerals Corp. v. Presnell, 111 Idaho 945, 729 P.2d 420 (Ct. App. 1986).

#### ANALYSIS

Burden of proof.

Correction of affidavit.

Evidence.

Fee.

Forfeiture of corporate charter.

—Weight.

Presumption raised by filing.

Prima facie evidence overcome.

Weight of evidence.

#### Burden of Proof.

One who adversely claims title to a mining claim by forfeiture and relocation must prove by clear and convincing evidence that the annual labor was not performed and must prove that his or her own locations are valid. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

Although an adverse claimant has the ultimate burden of proof — i.e., the risk of nonpersuasion — on the question of whether annual labor was performed, the party asserting that such work was done has an initial burden of going forward with prima facie evidence and the filing of an affidavit under this section suffices to meet this initial burden; the adverse claimant must overcome the affidavit or other prima facie proof by clear and convincing evidence that the work was not performed. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

#### Correction of Affidavit.

If a mistake is made in such notice, it may be corrected by oral evidence. Fact as to whether work was done is main question, and

not its method of proof. *Bismarck Mt. Gold Mining Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 P. 14 (1908).

Where affidavit listed wrong person as the owner of the claims and incorrectly identified name of claim, but competent evidence was adduced at trial to explain these deficiencies, they were not fatal. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

#### Evidence.

The district did not err in finding that the assessment work had been performed where there was testimony concerning the labor and an affidavit was filed. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

#### Fee.

Prior to the 1913 amendment of this section, the fee for recording affidavit of labor was fifty cents for each claim named in such affidavit. *Empire Copper Co. v. Henderson*, 15 Idaho 635, 99 P. 127 (1908).

#### Forfeiture of Corporate Charter.

Temporary forfeiture of corporate charter did not, of itself, result in forfeiture of the mining claims. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

#### —Weight.

Once claimant of relocated mining claim presented evidence refuting owner's annual affidavit, the issue of whether the work had been performed was no longer governed by the prima facie effect of the affidavit, rather, the issue then turned upon a weighing of the conflicting evidence. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

#### Presumption Raised by Filing.

Presumption is raised when defendants in quiet title suit to mining claim supported their contention that annual trips were made to the property and gold recovered therefrom by the facts that each fall one defendant returned from mining trip with gold, that defendants were seen from time to time on the property mining and prospecting, and that they made and filed affidavits of having done annual assessment work. *Independence Placer Mining Co. v. Hellman*, 62 Idaho 180, 109 P.2d 1038 (1941).

#### Prima Facie Evidence Overcome.

When prima facie evidence is met and overcome by positive evidence that labor had not been performed, it then devolves upon the respondent to show by evidence of a positive

and affirmative nature other than affidavit that work had actually been performed. *Dickens-West Mining Co. v. Crescent Mining & Milling Co.*, 26 Idaho 153, 141 P. 566 (1914).

**Weight of Evidence.**

Once claimant of relocated mining claim presented evidence refuting owner's annual affidavit, the issue of whether the work had

been performed was no longer governed by the prima facie effect of the affidavit, rather, the issue then turned upon a weighing of the conflicting evidence. *Golden Condor, Inc. v. Bell*, 106 Idaho 280, 678 P.2d 72 (Ct. App. 1984), aff'd, 112 Idaho 1086, 739 P.2d 385 (1987).

**Collateral References.** 58 C.J.S., *Mines and Minerals*, § 93.

**47-607. Location of abandoned claim.** — The location of abandoned claims shall be done in the same manner as if the location were of a new claim including the erection of new posts or monuments. [1895, p. 25, § 7; reen. 1899, p. 237, § 7; reen. R.C., § 3212; C.L., § 3212; C.S., § 5526; I.C.A., § 46-607; am. 1970, ch. 92, § 9, p. 227.]

**Cited in:** *Weigle v. Salmino*, 49 Idaho 522, 290 P. 552 (1930).

**Collateral References.** 58 C.J.S., *Mines and Minerals*, § 98.

**47-608. Notice must claim only one location.** — No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport to claim more than one location it is absolutely void. [1895, p. 25, § 8; reen. 1899, p. 237, § 8; reen. R.C. & C.L., § 3213; C.S., § 5527; I.C.A., § 46-608.]

**47-609. Security to surface owners — Injunction.** — When the right to mine is in any case separate from the ownership or right of occupancy of the surface ground, the owners or rightful occupants of the surface ground may demand satisfactory security from the miners, and if it be refused or not given, may enjoin such miners from working such ground until such security is given. The court granting the writ of injunction shall fix the amount and nature of the security. [1895, p. 25, § 10; reen. 1899, p. 237, § 10; reen. R.C. & C.L., § 3214; C.S., § 5528; I.C.A., § 46-609.]

**47-610. Deputy recorders — Appointment — Term of service.** [Repealed.]

**Compiler's notes.** This section which comprised S.L. 1881, p. 262, § 4; R.S., § 3103; am. 1895, p. 25, § 9; reen. 1899, p. 237, § 9; reen. R.C., § 3215; C.L., § 3215; C.S.,

§ 5529; am. 1931, ch. 114, § 1, p. 195; I.C.A., § 46-610, was repealed by S.L. 1970, ch. 92, § 10.

**47-611. Affidavit of locators.** — At or before the time of presenting a location notice for record, whether it be for a quartz lode or placer claim, one (1) of the locators named in the same must make and subscribe an affidavit, in writing on or attached to the notice, substantially in the following form, to wit:

State of Idaho, county of . . . , ss.

I, . . . , do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such), and that I am acquainted with the mining ground described in this notice of location, and



herewith called the .... lode or placer claim; that the ground and claim therein described or any part thereof has not, to the best of my knowledge and belief, been previously located according to the laws of the United States and this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws.

.....  
Signature

Subscribed and sworn to before me this .... day of .....  
.....

Signature

[1881, p. 262, § 5; R.S., § 3104; am. 1895, p. 25, § 13; reen. 1899, p. 237, § 13; reen. R.C., § 3216; C.L., § 3216; C.S., § 5530; I.C.A., § 46-611; am. 1970, ch. 92, § 11, p. 227; am. 2002, ch. 32, § 20, p. 46.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Sections 19 and 21 of S.L. 2002, ch. 32, are compiled as §§ 47-606 and 49-1702, respectively.

**Cited in:** Bismarck Mt. Gold Mining Co. v. North Sunbeam Gold Co., 14 Idaho 516, 95 P. 14 (1908); Independence Placer Mining Co. v. Hellman, 62 Idaho 180, 109 P.2d 1038 (1941).

ANALYSIS

**Affidavit by agent.**  
Validity and construction.

**Affidavit by Agent.**  
Agent or attorney in fact may locate a

mining claim for his principal and may make affidavit required by this section. Dunlap v. Pattison, 4 Idaho 473, 42 P. 504, 95 Am. St. 140 (1895).

**Validity and Construction.**

This section in requiring an affidavit to location notice prescribes a reasonable regulation and is not in conflict with 9 U.S.C., tit. 30, § 26. Van Buren v. McKinley, 8 Idaho 93, 66 P. 936 (1901).

Affidavit as required by this section is necessary to a valid location. Van Buren v. McKinley, 8 Idaho 93, 66 P. 936 (1901).

**Collateral References.** 54 Am. Jur. 2d, Mines and Minerals, §§ 57-67.

**47-612. Manner of recording notices.** — The location notice herein required to be recorded must be recorded in the office of the county recorder of the county in which the claim is located (when the legal fee therefor is tendered), in a book kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. [1881, p. 262, § 6; R.S., § 3105; am. 1895, p. 25, § 14; reen. 1899, p. 237, § 14; reen. R.C. & C.L., § 3217; C.S., § 5531; am. 1931, ch. 114, § 2, p. 195; I.C.A., § 46-612; am. 1937, ch. 7, § 1, p. 18; am. 1957, ch. 170, § 1, p. 305; am. 1970, ch. 92, § 12, p. 227; am. 1976, ch. 281, § 5, p. 962.]

**Compiler's notes.** The words enclosed in parentheses so appeared in the law as enacted.

Sections 13-17 of S.L. 1970, ch. 92 repealed former §§ 47-613 — 47-617, respectively.

Section 4 of S.L. 1976, ch. 281 is compiled as § 47-606.

**Cross ref.** Fees of county recorder for administering oath to locator and certifying same, § 31-3205.

**47-613. Certain surveys may qualify as annual labor.** — Annual assessment work or labor upon a mining claim as required by the United States mining laws shall be defined to include, without being limited to,

geological, geochemical and geophysical surveys conducted by qualified experts and verified by a detailed report filed for record in the office of the county recorder of the county in which the claim is located which sets forth fully (1) the location of the work performed in relation to the boundaries of the claim, (2) the nature, extent, and costs thereof, (3) the basic findings therefrom, and (4) the name, address, and professional background of the person or persons conducting the work. Surveys of this kind, however, may not be applied as labor for more than two (2) consecutive years or for more than a total of five (5) years on any one (1) mining claim, and each of these surveys shall be nonrepetitive of any previous survey on the same claim. [I.C., § 47-613, as added by 1970, ch. 92, § 18, p. 227.]

**Compiler's notes.** Former § 47-613 which comprised S.L. 1881, p. 262, § 7; R.S., § 3106; reen. R.C., § 3218; C.L., § 3218; C.S., § 5532; I.C.A., § 46-613, was repealed by S.L. 1970, ch. 92, § 13.

#### **47-614. Definitions. — As used in section 47-613:**

(1) the term "geological surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of geology as they relate to the search for and discovery of mineral deposits;

(2) the term "geochemical surveys" means surveys on the ground for mineral deposits by the proper application of the principles and techniques of the science of chemistry as they relate to the search for and discovery of mineral deposits;

(3) the term "geophysical surveys" means surveys on the ground for mineral deposits through the employment of generally recognized equipment and methods measuring physical differences between rock types or discontinuities in geological formations;

(4) the term "qualified expert" means an individual qualified by education or experience to conduct geological, geochemical, or geophysical surveys. [I.C., § 47-614, as added by 1970, ch. 92, § 19, p. 227.]

**Compiler's notes.** Former § 47-614 which comprised S.L. 1903, p. 290, § 1; am. R.C., § 3219; C.L., § 3219; C.S., § 5533; I.C.A., § 46-614, was repealed by S.L. 1970, ch. 92, § 14.

#### **47-615 — 47-617. Seal of deputies — Limitation on powers — Placer claims — Location. [Repealed.]**

**Compiler's notes.** These sections, which comprised S.L. 1881, p. 262, § 8; 1895, p. 25, §§ 11, 12; 1897, p. 13, § 1; 1899, p. 237, §§ 11, 12; R.S., § 3107; R.C., §§ 3220-3222; C.L., §§ 3220-3222; C.S., §§ 5534-5536; I.C.A., §§ 46-615 — 46-617, were repealed by S.L. 1970, ch. 92, §§ 15-17, respectively.

**47-618. Lode and placer claims — Official patent survey as labor on improvement. —** It is hereby declared that an official patent survey of a lode or placer mining claim or claims by a United States mineral surveyor constitutes and is labor performed upon an improvement made upon or for the benefit of an unpatented lode or placer mining claim or claims. [C.S., § 5536-A, as added by 1929, ch. 194, § 1, p. 361; I.C.A., § 46-618.]



**47-619. Lode and placer claims — Official patent survey as credit on annual assessment work.** — An official patent survey of a lode or placer mining claim or claims by a United States mineral surveyor may be credited to annual assessment work or labor, but in no case shall the credit for such survey and its attendant expense exceed the required assessment for one (1) year on the claim or claims surveyed. When credit is sought for such work or improvement, the claimant must file in the recorder's office in the county in which such claim is situated the affidavit of such United States mineral surveyor, showing the cost of such survey, and when so filed the actual cost of such survey shall be deemed and considered as labor and improvements done and performed upon said claim or claims. [C.S., § 5536-B, as added by 1929, ch. 194, § 2, p. 361; I.C.A., § 46-619.]

## CHAPTER 7

### MINERAL RIGHTS IN STATE LANDS

#### SECTION.

47-701. Reservation of mineral deposits to state — Terms defined.

47-701A. Definition.

47-702. Right of exploration and withdrawal.

47-703. Exploration locations on state lands.

47-703A. Exploration on state lands — Bond.

47-704. Leases of mineral rights in state lands.

47-705. Appraisal of improvements — Term construed.

47-706. Forfeiture of improvements.

47-707. Forfeiture of leases.

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#### SECTION.

47-710. Forms, rentals, royalties, and fees.

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47-714. Leases of navigable river beds authorized.

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47-716. Applicable only to deposits in natural state.

47-717. Removal of commercial quantities without lease unlawful.

47-718. Violations — Remedies — Penalties.

**47-701. Reservation of mineral deposits to state — Terms defined.** — (1) The terms "mineral lands," "mineral," "mineral deposits," "deposit," and "mineral right," as used in this chapter, and amendments thereto shall be construed to mean and include all coal, oil, oil shale, gas, phosphate, sodium, asbestos, gold, silver, lead, zinc, copper, antimony, geothermal resources, salable minerals, and all other mineral lands, minerals or deposits of minerals of whatsoever kind or character.

(2) Such deposits in lands belonging to the state are hereby reserved to the state and are reserved from sale except upon a rental and royalty basis as herein provided, and the purchaser of any land belonging to the state shall acquire no right, title or interest in or to such deposits, and the right of such purchaser shall be subject to the reservation of all mineral deposits and to the conditions and limitations prescribed by law providing for the state and persons authorized by it to prospect for, mine, and remove such deposits and to occupy and use so much of the surface of said land as may be required for all purposes reasonably incident to the mining and removal of such deposits therefrom.

(3) An exchange of state land consummated by the board under authority of section 58-138, Idaho Code, shall not be considered a sale of state lands.

The transfers of mineral deposits heretofore made in such exchanges are hereby approved. [1923, ch. 96, § 1, p. 115; am. 1925, ch. 220, § 1, p. 404; I.C.A., § 46-701; am. 1981, ch. 325, § 1, p. 676; am. 1986, ch. 81, § 1, p. 239; am. 1992, ch. 226, § 1, p. 676.]

**Compiler's notes.** Section 2 of S.L. 1992, ch. 226 is compiled as § 58-138.

**Cross ref.** Public lands, tit. 58.

**Sec. to sec. ref.** This chapter is referred to in §§ 42-3119.

This section is referred to in §§ 47-703 and 63-3605B.

**Cited in:** Allen v. Smylie, 92 Idaho 846, 452 P.2d 343 (1969).

#### ANALYSIS

Construction with other statutes.

Effect of amendments.

Mineral reservations taxable as personalty.

Reserved to state.

Suit for damage to mining claim.

#### Construction with Other Statutes.

Where the basis for a request for attorney fees was an action to quiet title in real property, the outcome of which depended on the interpretation of this section, and on whether sand, gravel and pumice were included in the minerals reserved by the state in that statute, the ruling that attorney fees were not awardable under the provision covering commercial transactions was affirmed. *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 978 P.2d 233 (1999).

#### Effect of Amendments.

A district court did not err in concluding that sand, gravel and pumice did not constitute "minerals" within the meaning of this section prior to its amendment in 1986. *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 978 P.2d 233 (1999).

#### Mineral Reservations Taxable as Personalty.

Under statute defining personalty for tax purposes as "equities in state lands, easements, and reservations," mineral reservations were assessable as personalty and not as realty, as against the contention that under

ejusdem generis rule reservations in state lands only were intended to be classified as personalty, since the reservations in state lands were not taxable. In re *Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 664 (1936).

#### Reserved to State.

Mineral rights of state lands, including school endowment lands, are reserved to the state. *Ehco Ranch, Inc. v. State ex rel. Evans*, 107 Idaho 808, 693 P.2d 454 (1984).

#### Suit for Damage to Mining Claim.

In suit brought by owners of a placer mining claim alleging defendant village without their permission seized property upon which the claim was located and was using the same as a dump ground rendering it useless as a mining claim, evidence supported the finding that the land upon which defendant was dumping trash was situated below the natural high water mark of the Salmon River and the Salmon River being a navigable stream, its bed below the natural high water mark was the property of the state of Idaho and damages could not be recovered. *Halmadge v. Riggins*, 78 Idaho 328, 303 P.2d 244 (1956).

**Collateral References.** 53A Am. Jur. 2d, Mines and Minerals, §§ 33-37.

58 C.J.S., Mines and Minerals, § 29.

Effect of language in conveyance specifying purpose for which property is to be used, on mineral rights in land. 5 A.L.R. 1498; 39 A.L.R. 1340.

What are mineral rights within meaning of a deed, lease, or license. 17 A.L.R. 156; 86 A.L.R. 983.

Oil and gas as "minerals" within deed, lease, or license. 37 A.L.R.2d 1440.

Clay, sand, or gravel as "minerals" within deed, lease, or license. 95 A.L.R.2d 843.

Grant, lease, exception, or reservation of "oil, gas, and other minerals," or the like, as including coal or metallic areas. 59 A.L.R.3d 1146.

**47-701A. Definition.** — As used in section 47-701, Idaho Code, the term "salable minerals," means a mineral substance that can be taken from the earth and that has a value in and of itself separate and apart from the earth and includes, but is not limited to, building stone, cinders, pumice, scoria, clay, diatomaceous earth, sand, gravel, quartz, limestone and marble. [I.C., § 47-701A, as added by 1986, ch. 81, § 2, p. 239.]

**Compiler's notes.** Section 3 of S.L. 1986, ch. 81 is compiled as § 47-704.

**Sec. to sec. ref.** This section is referred to in § 63-3605B.



**47-702. Right of exploration and withdrawal.** — (1) All lands belonging to the state of Idaho in which the mineral deposits, excepting oil and gas and geothermal resources, are owned by the state, and which have not been located, leased, or withdrawn in accordance with the terms of this chapter, are hereby declared to be free and open to casual exploration.

(2) The board of land commissioners is authorized in its discretion to withdraw from entry and exploration specifically described tracts of state lands under its control and jurisdiction, or state lands under the control and jurisdiction of other state agencies. Within thirty (30) days of the decision for such withdrawal the board of land commissioners shall publish a notice in a newspaper of general circulation in the county or counties in which such lands are situated providing the legal description of the lands withdrawn. Concerned citizens shall have thirty (30) days from the date of publication to request an appeal of such withdrawal to the board of land commissioners. [1923, ch. 96, § 2, p. 115; I.C.A., § 46-702; am. 1981, ch. 325, § 2, p. 676; am. 1986, ch. 131, § 1, p. 239.]

**Collateral References.** 58 C.J.S., Mines and Minerals, § 27 et seq.

**47-703. Exploration locations on state lands.** — (1) Location for exploration purposes may be made upon lands belonging to the state of Idaho in which the mineral rights are reserved or belong to the state, including the beds of all navigable rivers in the state of Idaho and all portions of said navigable rivers between the natural or ordinary high water marks, providing that no exploration location may be made on any lands for which a mineral lease application has been made and is pending as provided in section 47-704, Idaho Code; providing further, that no exploration location may be made for salable minerals as that term is used in section 47-701, Idaho Code.

(2) Such locations when made upon surveyed land shall conform to legal subdivisions. When made upon the beds of navigable rivers they shall not exceed one-half ( $\frac{1}{2}$ ) river mile. When made on surveyed land they shall not exceed twenty (20) acres except that when made upon surveyed land designated as a lot, they may equal one-half ( $\frac{1}{2}$ ) of said lot. Descriptions of locations made on the beds of navigable rivers, the boundaries of which shall have been meandered, shall be described as near as may be with the lotting of the fractional subdivisions bordering upon the navigable rivers, and the description of the location shall be so accurately drawn and tied to the government corners that the ground may be accurately located and so described that the location may be accurately platted upon the books of the state board of land commissioners.

(3) The discoverer of a mineral deposit, or a person desiring to prospect for mineral shall immediately post conspicuously on each twenty (20) acre tract or fraction thereof or each one-half ( $\frac{1}{2}$ ) river mile, that he desires to locate, an exploration certificate of location declaring that he has made such discovery, or/and declaring that he desires to prospect for mineral, together with the date of such discovery or declaration. Said certificate shall be in such form as the board may prescribe. The locator shall be allowed twenty

(20) days from such date to file an exact copy of exploration certificate of location with the state board of land commissioners and pay the appropriate fees. Said certificate shall designate the legal subdivisions located, and shall be recorded in the office of said board as of the date of filing, and an entry of such location shall be made upon the plat and tract books.

(4) The locator shall be entitled to hold said location for a period of two (2) years from the first of the month following the date of recording and by performing one hundred dollars (\$100) worth of work during each year for each location.

(5) Work, within the meaning of this section shall consist of tunnels, shafts, or other mining excavations or development, including drilling by conventional methods and pits or shafts sunk to determine the value of the gravels. Work shall not include roads, trails, buildings, machinery, or other surface improvement. All such work may be done at one (1) place on the location or at as many places as the locator may desire, and in case two (2) or more locations are under the same ownership, then said work may be performed on any one or more locations. Work so performed as annual assessment, where performed for the benefit of a group contiguous and under common ownership, shall be such that it shall be of material benefit to each and every location forming the contiguous group.

(6) Written proof that such work has been done shall be filed with the state board of land commissioners, on such forms and in such manner as they shall prescribe. Such procedure shall empower the locator to retain possession of and prospect said location for a period of two (2) years, at the end of which time he shall be required to take a lease upon such terms as may be agreed upon by the state board of land commissioners. Provided, that the right granted under this section to prospect for mineral and to make locations shall not extend to lands in the possession of a purchaser under contract of sale from the state. [1923, ch. 96, § 3, p. 115; am. 1925, ch. 220, § 2, p. 404; I.C.A., § 46-703; am. 1933, ch. 107, § 1, p. 169; am. 1937, ch. 124, § 1, p. 185; am. 1951, ch. 72, § 1, p. 112; am. 1981, ch. 325, § 3, p. 676; am. 1990, ch. 316, § 1, p. 861.]

**Compiler's notes.** Section 2 of S.L. 1990, ch. 316 is compiled as § 47-704.

**Cross ref.** Notice by mail, § 60-109A.

**Sec. to sec. ref.** This section is referred to in § 47-704.

#### ANALYSIS

Effect of failure to record location notice.  
Work on claim.

#### Effect of Failure to Record Location Notice.

The failure to record a notice of location of a placer claim within the statutory time does not work a forfeiture or invalidate the location as between the parties thereto, even if the claims are on state land. *Brabazon v. Gordon*, 65 Idaho 446, 145 P.2d 484 (1944).

#### Work on Claim.

The congress of the United States and the

Idaho legislature have long recognized and permitted the practice of doing work upon one mining property for the benefit of other mining property as long as a minimum total is performed. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

**Collateral References.** 58 C.J.S., Mines and Minerals, § 37.

Character of work or expenditures which may be credited to annual assessment or improvement work. 14 A.L.R. 1463.

Effect of act or joint resolution of congress suspending requirement of assessment work on mining claims. 15 A.L.R. 942.

Duty, as to development and operation of mines, of purchaser of mineral rights other than oil and gas. 60 A.L.R. 901; 76 A.L.R.2d 721.



**47-703A. Exploration on state lands — Bond.** — (1) With the exception of casual exploration as defined in section 47-703A(4)(a), Idaho Code, prior to any entry or exploration with motorized equipment on state lands, an operator shall first submit to the director of the department of lands, an exploration and reclamation plan and a bond in such form as prescribed by the board not to exceed seven hundred and fifty dollars (\$750) per affected acre conditioned on the payment of all damages to the land and resources thereon caused by the entry and/or exploration, with motorized equipment; provided, that where applicable, an operator shall also comply with the dredge and placer mining act, chapter 13, title 47, Idaho Code. Written approval by the board is required for motorized exploration prior to entry.

(2) Weather permitting, the board shall deliver to the operator within sixty (60) days after the receipt of any exploration and reclamation plan a notice of rejection or notice of approval of said plan, as the case may be; provided, however, that if the board fails to deliver a notice of approval or notice of rejection within said time period, the plan submitted shall be deemed approved under subsection (1) of this section, and the operator may, upon furnishing a bond to the board that meets the requirements of subsection (1) of this section, commence and conduct his exploration operations with motorized equipment on the lands covered by such plan as if a notice of approval of said plan had been received from the board; provided, however, that if weather conditions prevent the board from inspecting the lands to obtain information needed to approve or reject a submitted plan, it may, in writing to the operator, extend the time not to exceed thirty (30) days after weather conditions permit such inspection. Any notice of rejection issued by the director of the department of lands or his properly authorized designated officer may be appealed by the operator to the board.

(3) The operator shall reclaim the surface damaged by the entry and/or exploration with motorized equipment to the approximate previous contour and condition insofar as is reasonably possible.

(4) The following definitions shall apply to this chapter:

(a) "Casual exploration" means entry and/or exploration which does not appreciably disturb or damage the land or resources thereon. Casual exploration includes, but is not limited to, geochemical and/or geophysical exploration techniques, sampling with hand tools, and entry using wheeled vehicles for transportation to conduct such exploration. Exploration using suction dredges having an intake diameter of two (2) inches or less shall be considered casual exploration when operated in a perennial stream and authorized under the stream protection act, chapter 38, title 42, Idaho Code.

(b) "Motorized exploration" means exploration which may appreciably disturb or damage the land or resources thereon. Motorized exploration includes, but is not limited to, drilling, trenching, dredging, or other techniques which employ the use of earth moving or other motorized equipment, seismic operations using explosives, and sampling with suction dredges having an intake diameter greater than two (2) inches when

operated in a perennial stream. When operated in an intermittent stream, suction dredges shall be considered motorized exploration regardless of the intake size. [I.C., § 47-703A, as added by 1981, ch. 325, § 4, p. 676; am. 1990, ch. 317, § 1, p. 865.]

**Sec. to sec. ref.** This section is referred to in § 47-718.

**47-704. Leases of mineral rights in state lands.** — (1) The state board of land commissioners may lease in tracts not exceeding six hundred forty (640) acres for prospecting and mining purposes, and mineral deposits, except for leases for oil, gas and other hydrocarbons, that may be contained in any portion of the unsold lands of the state or that may be contained in state lands sold with a reservation of mineral deposits or belong to the state of Idaho by reason of being situate between the high water marks of navigable rivers of the state, for such annual rental, not less than one dollar (\$1.00) per acre per annum, and for such royalty upon the product as the board may deem fair and in the interest of the state, except in the case of state oil and gas leases wherein the royalty to the state shall be not less than twelve and one-half per cent (12½%), and provided that the minimum royalty shall not be less than two and one-half per cent (2½%). The rental paid for any year shall be deducted from the royalties as they accrue for that year.

(2) All mineral leases, except leases for oil, gas, and other hydrocarbons, and geothermal resources of state school lands and for lands belonging to the state of Idaho, other than school lands, shall be for a term of ten (10) years, and so long thereafter as precious metals, minerals, salable minerals, and ores, or any of them, are produced in paying quantities, or as much longer thereafter as the lessee in good faith shall conduct mining operations thereon, together with the right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to the prospecting for, exploration for, development of, production, refining, processing and marketing of said precious metals, minerals, salable minerals, and ores produced from said lands, including the right to construct and maintain thereon all works, buildings, plants, waterways, roads, communication lines, reservoirs, tanks or other structures necessary to the full enjoyment thereon for the purpose of the lease.

(3) Provided, that the leaseholder of any mineral lease except leases for oil, gas, and other hydrocarbons, and geothermal resources heretofore or hereafter issued, upon the expiration of the initial lease and all renewals thereof, shall be given the preferential right to renew such lease or renewal leases under such readjustment of the terms and conditions as the board may determine to be necessary in the interest of the state.

(4) All applications received, whether by mail or by personal delivery over the counter, shall be immediately stamped with the date and hour of filing. Simultaneous filings result when two (2) or more applications are received for the same lands during the same hour of the same day. Simultaneous filings shall be resolved by competitive bidding. This provision does not apply to applications received from an applicant having a preferential right



under subsection (5) of this section. In the absence of a simultaneous filing, and except for lands and resources which may be designated for competitive bidding, right of priority to a mineral lease shall be determined by the first qualified applicant who shall file a completed, signed application on the form of the department of lands or exact copy thereof between the hours of eight and five during any business day, together with the application fee set by the board.

(5) Applications for mineral leases shall be made under oath in such form as the board may prescribe, and the applicant shall describe the land, specify the particular mineral or minerals, and give such additional information as may be required by the rules and regulations of the board. If the applicant for a lease has previously filed a certificate of location, as provided in section 47-703, Idaho Code, upon any part of the land desired to be leased, such application shall be given a preferential right to the land covered by his location; that no lands upon which a mineral location has been duly made and recorded as provided in section 47-703, Idaho Code, shall be leased for mining purposes during the two (2) year periods to any applicant except the person having made such location; provided, however, that no locations may be made for oil and gas deposits or lands, or geothermal resources.

(6) Any motorized exploration as defined in section 47-703, Idaho Code, on the lands between the ordinary high water marks of any navigable river of the state shall be prohibited except upon written approval by the board and submission of a bond to the department in the form and amount set by the board; and if applicable, an operator shall also comply with the dredge and placer mining act, chapter 13, title 47, Idaho Code; provided, that in all instances an operator shall comply with the stream protection act, and all other applicable laws and rules of the state.

(7) Upon receipt by the state board of land commissioners of an application to lease any lands which may belong to the state of Idaho by reason of being situate between the high water marks of navigable rivers of the state, the board shall cause at the expense of the applicant, a notice of such application to be published once a week for two (2) issues in a newspaper of general circulation in the county or counties in which said lands described in said application are situated. The board or its authorized representative shall hold a public hearing on the application, if requested in writing no later than thirty (30) days after the last published notice by ten (10) persons whose lawful rights to use the waters applied for may be injured thereby, or by an association presenting a petition with signatures of not less than ten (10) such aggrieved parties; provided that the board may order a public hearing in the first instance. The board shall consider fully all written and oral submissions respecting the application.

(8) Provided, however, that the state board of land commissioners shall send notice of any such application for leasing the bed of navigable rivers to the director of the department of water resources, who, if the director thinks advisable, shall at the expense of the applicant make an investigation. If said investigation shows that the rights of interested parties may be jeopardized by the issuance of the proposed lease, the director shall give notice of such applications to parties affected thereby. If it shall appear to

the state board of land commissioners that the leasing of any lands between the high water marks of any navigable river will be injurious to the rights of any person or persons having the right to the use of the waters thereof for irrigation, power, or any other lawful purpose, the state board of land commissioners shall deny such application. [1923, ch. 96, § 6, p. 115; am. 1925, ch. 220, § 3, p. 404; I.C.A., § 46-706; am. 1937, ch. 124, § 2, p. 185; am. 1939, ch. 99, § 1, p. 166; am. 1949, ch. 77, § 1, p. 135; am. 1951, ch. 43, § 1, p. 52; am. 1957, ch. 201, § 1, p. 416; am. 1957, ch. 210, § 1, p. 439; am. 1967, ch. 225, § 1, p. 676; am. 1980, ch. 31, § 1, p. 54; am. 1981, ch. 325, § 5, p. 676; am. 1986, ch. 81, § 3, p. 239; am. 1990, ch. 316, § 2, p. 861; am. 1990, ch. 317, § 2, p. 865.]

**Compiler's notes.** This section was amended by two 1990 acts, ch. 316, § 2 and ch. 317, § 2, which do not appear to conflict and have been compiled together.

The amendment by ch. 316, § 2, in subsection (1) in the first sentence substituted "one dollar (\$1.00)" for "twenty-five cents (25¢)"; in subsection (4) in the second sentence substituted "result when two (2) or more applications are received for the same lands during the same hour of the same day" for "will be resolved by a drawing within thirty (30) days thereafter" and added the present third and fourth sentences; in subsection (5) in the first sentence deleted "indicate the annual rental and royalty offered by him" following "describe the land,"; and in subsection (8) in the first and second sentences substituted "the director" for "he" following "who, if" and "proposed lease," respectively.

The amendment by ch. 317, § 2 in subsection (6) added "motorized" following "Any", deleted "with heavy motorized equipment" following "exploration", substituted "water marks" for "watermarks" preceding "of any navigable", substituted "upon written approval" for "after award of a lease" following "prohibited except" and substituted "protection" for "channel alteration" following "with the stream".

For Federal law on mineral leases on school lands, see 43 U.S.C., §§ 870, 871.

Section 3 of S.L. 1937, ch. 124 is compiled as § 47-714.

Section 2 of S.L. 1967, ch. 225 is compiled as § 47-707.

Section 6 of S.L. 1981, ch. 325 is compiled as § 47-718.

Section 2 of S.L. 1986, ch. 81 is compiled as § 47-701A.

Section 1 of S.L. 1990, ch. 316 is compiled as § 47-703.

**Sec. to sec. ref.** This section is referred to in § 47-718.

#### ANALYSIS

Discretion of board.  
Effect of procedural defects.  
Lease on offer by board.  
Renewal of lease.

#### Discretion of Board.

The state board of land commissioners is required to use considerable judgment in the granting of mineral leases; thus a writ of mandate would not be available to compel them to issue a lease in the absence of conduct that is arbitrary, capricious or discriminatory. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

#### Effect of Procedural Defects.

There is authority that a defect in the procedure by which public lands are leased will not justify cancellation of a prior issued lease when there has been no application of a third party between the time the defect occurred and the time the lease issued. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

#### Lease on Offer by Board.

Requirement that application under oath be made for lease was not applicable where lessee made no such application but received and accepted offer of lease from the land board; and lease created in this manner was not void. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

#### Renewal of Lease.

Where respondent was offered leases in 1958 by land board and accepted same, such leases were not renewals of previous leases on same properties by same parties made pursuant to this section in 1948 and renewed in 1953, since provision of this section as it was in 1948, specifying only one renewal, became a part of 1948 leases and foreclosed any renewals beyond the one provided for. *Allen v. Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

**47-705. Appraisal of improvements — Term construed. —** Should any one apply to lease for prospecting and mining purposes the mineral



deposits belonging to the state upon which improvements have been made, before the lease shall issue, to other than the owner of the improvements thereon, the applicant shall pay to the owner thereof the value of said improvements and shall file in the office of the state board of land commissioners a receipt showing that the price of said improvements, as agreed upon by the parties or fixed by appraisalment under authority of the said board, has been paid to the owner thereof in full, or shall make satisfactory proof that he has tendered to such owner the price of said improvements so agreed upon or fixed by appraisalment. The word "improvements" within the meaning of this section and of section 47-706 shall be construed to mean work performed in the development of the property, the estimated value of all known or probable mineral contained in the land that has been discovered or developed through mining excavations made by lessee, and all buildings, dwellings, mill machinery, mine machinery, trails, roads, and all equipment used, constructed and necessary for the operation of the mine, mill or plant. [1923, ch. 96, § 7, p. 115; am. 1925, ch. 220, § 4, p. 404; I.C.A., § 46-707.]

**47-706. Forfeiture of improvements.** — If any mineral lease has been canceled for a period of one (1) year and a new lease has not issued the improvements upon the property shall revert to and become the property of the state. [1923, ch. 96, § 8, p. 115; I.C.A., § 46-708.]

**47-707. Forfeiture of leases.** — All leases of mineral deposits shall be conditional upon payment of the rental in advance annually, and upon the payment of the royalty provided for in the lease, and such other provisions as may be provided by the board, and upon the violation of any of the conditions of the lease, the board may at its option, after thirty (30) days' notice by registered mail, cancel the lease. Upon failure or refusal of the lessee to accept the readjustment of terms and conditions determined by the board at the end of any lease period, such failure or refusal shall work a forfeiture of the preferential right of the lessee. A forfeiture of such lease, and all rights of the lessee thereunder, may be declared by the state board of land commissioners for a violation of any of the terms or conditions of said lease or of any rule or regulation of said board with respect thereto or of any of the provisions of this chapter. [1923, ch. 96, § 9, p. 115; am. 1925, ch. 220, § 5, p. 404; I.C.A., § 46-709; am. 1967, ch. 225, § 2, p. 676.]

**Sec. to sec. ref.** This section is referred to in §§ 47-718 and 47-812.

**Cited in:** *Hutchins v. Trombley*, 95 Idaho 360, 509 P.2d 579 (1973).

**Collateral References.** 58 C.J.S., Mines and Minerals, § 210.

**47-708. Rights and liabilities of lessees.** — A lessee of valuable mineral deposits shall have the right at all times to enter upon the lands described in his lease for prospecting and mining, provided he shall not injure, damage, or destroy the improvements of the surface owner; and the lessee shall be liable to and shall compensate such owner for all damages to the surface of said land and improvements thereon.

Any such lessee may occupy so much of the surface of said land as may be required for all purposes reasonably incident to the mining and removal of the mineral deposits: first, upon securing the written consent or waiver of the surface owner; or, second, upon payment of the damages to the surface of said land and improvements thereon to the owner thereof where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond, or undertaking, to the state of Idaho, for the use and benefit of the owner of the land to secure the payment of such damages, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in the form prescribed by and in accordance with the rules and regulations of the board and to be filed with and approved by the board.

Lessees of mineral lands shall fully protect the rights of all agricultural and grazing leases which have been heretofore, or may be hereafter granted, by erecting and keeping closed gates in all fences which may be opened, and inclosing or keeping covered all shafts, holes or open cuts. [1923, ch. 96, § 10, p. 115; am. 1925, ch. 220, § 6, p. 404; I.C.A., § 46-710.]

Compiler's notes. Section 7 of S.L. 1925, ch. 220 is compiled as § 47-712.

Sec. to sec. ref. This section is referred to in § 47-718.

**47-709. Mines operated under lease — Inspection by board. —** The state board of land commissioners shall cause inspection to be made by a competent person or persons of all mines or works operated under leases for the production of minerals as often as the board shall deem necessary in the interest of the state, and the board shall have the right at all times to inspect said mines or works. [1923, ch. 96, § 11, p. 115; I.C.A., § 46-711.]

**47-710. Forms, rentals, royalties, and fees. —** The board shall by rules and regulations prescribe the form of application, the form of lease, the amount of filing and recording fees, the annual rental, the amount of royalty, the basis upon which the royalty shall be computed, and such other details as it may deem necessary in the interest of the state, except as otherwise provided in this chapter. [1923, ch. 96, § 12, p. 115; I.C.A., § 46-712.]

**47-711. Sale of state lands containing mineral deposits. —** Lands in which minerals are contained and the surface of which has a value for other purposes may be sold under the provisions of chapter 3 of title 58 of the Idaho Code relating to the sale of state lands, provided that in the sale of such lands there shall be reserved to the state all such deposits and that the right of the purchaser shall be subject to the conditions and limitations prescribed by law providing for the state or persons authorized by it to prospect for, mine and remove such deposits and to occupy and use so much of the surface of such land as may be required for all purposes reasonably incident to the mining and removal of such deposits therefrom. [1923, ch. 96, § 13, p. 115; I.C.A., § 46-713.]



### **Mineral Reservations Taxable as Personality.**

Under statute defining personality for tax purposes as "equities in state lands, easements, and reservations," mineral reservations were assessable as personality and not

as realty, as against the contention that under ejusdem generis rule reservations in state lands only were intended to be classified as personality, since the reservations in state lands were not taxable. In re Winton Lumber Co., 57 Idaho 131, 63 P.2d 664 (1936).

### **47-712. Applications to purchase — Certificates of purchase. —**

All applications to purchase state lands approved subsequent to the passage of this chapter shall be subject to a reservation to the state of all mineral deposits in said land and of the right of the state or persons authorized by it to prospect for, mine and remove the same as provided by law; and all certificates of purchase issued by the state shall contain such reservation. [1923, ch. 96, § 14, p. 115; am. 1925, ch. 220, § 7, p. 404; I.C.A., § 46-714.]

**Compiler's notes.** Section 15 of S.L. 1923, ch. 96 is compiled as § 58-304.

**47-713. Effect of partial invalidity of chapter. —** If any clause, sentence, paragraph, or part of this chapter shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. [1923, ch. 96, § 16, p. 115; I.C.A., § 46-715.]

**Compiler's notes.** Section 17 of S.L. 1923, ch. 96 repealed all conflicting laws. Lumber Co., 57 Idaho 131, 63 P. 2d 664 (1936).

**Cross ref.** See note, § 47-701. In re Winton

**47-714. Leases of navigable river beds authorized. —** The board of land commissioners of the state of Idaho is hereby specifically authorized to lease for mining purposes the beds of navigable rivers of the state of Idaho between the high water marks thereof, said leases to be given under the terms and provisions of this chapter and the rules and regulations heretofore or hereafter adopted by said board. [I.C.A., § 46-718, as added by 1937, ch. 124, § 3, p. 185.]

**Compiler's notes.** Section 2 of S.L. 1937, ch. 124 is compiled as § 47-704.

**47-715. Collection of royalties by board of land commissioners. —** The board of land commissioners of the state of Idaho is hereby authorized to collect royalties and other payments to the state of Idaho under mineral leases provided for by this chapter. [I.C.A., § 46-719, as added by 1937, ch. 124, § 4, p. 185.]

**47-716. Applicable only to deposits in natural state. —** The provisions of this chapter authorizing the leasing of the beds of the navigable rivers in the state of Idaho shall apply only to deposits in their natural state and shall not apply to dumps and tailings. [I.C.A., § 46-720, as added by 1937, ch. 124, § 5, p. 185.]

**47-717. Removal of commercial quantities without lease unlawful.** — It shall be unlawful for any person, association, firm or corporation to remove in commercial quantities any ores, minerals, or deposits from state lands before securing a lease for said lands from the state board of land commissioners. Any person, association, firm or corporation who so removes ores, minerals or deposits shall be liable to the state for treble damages in a civil action. [I.C.A., § 46-721, as added by 1937, ch. 124, § 6, p. 185; am. 1989, ch. 262, § 1, p. 639.]

**Compiler's notes.** Section 7 of S.L. 1937, ch. 124 declared an emergency. Approved Mar. 15, 1937.

**47-718. Violations — Remedies — Penalties.** — (1) In addition to any other penalties and remedies of this chapter and at law, any person, firm, or corporation who violates any provisions of this chapter or rules adopted pursuant thereto, or who fails to perform the duties imposed thereby, or who violates any determination or order thereunder or any violation of a lease granted under this chapter, the director of the department of lands may:

(a) Proceed by legal action in the name of the state of Idaho to enjoin the violation, by temporary restraining order, preliminary injunction and/or permanent injunction.

1. The court, or a judge thereof at chambers, if satisfied from a verified complaint or by affidavit that the alleged violation has been or is being committed, may issue a temporary restraining order, without notice or bond, enjoining the defendant, his agents, employees, contractors and assigns from further violation, or from conducting exploration or mining on the state lands affected by the violation.

2. The verified complaint or affidavit that the alleged violation has been or is being committed shall constitute prima facie evidence of great or irreparable injury and/or great waste sufficient to support the temporary restraining order.

3. The action shall thereafter proceed as in other cases for injunctions. If at the trial the violation is established, the court shall enter a decree perpetually enjoining said defendant, his agents, employees, contractors and assigns from thereafter committing said or similar violations.

(b) Proceed by legal action in the name of the state of Idaho to obtain an order requiring the operator to promptly repair the damage and reclaim the state lands in accordance with the requirements of section 47-703A, Idaho Code, and rules adopted pursuant thereto. If thereafter the court finds that the operator is not promptly complying with such order, the court shall order the operator to immediately pay an amount determined by the department to be the anticipated cost of reasonable repair and reclamation in accordance with section 47-703A(2), Idaho Code, and rules adopted pursuant thereto.

(c) Proceed to forfeit the operator's bond required by section 47-703A(1), 47-704(6) or 47-708, Idaho Code. The board may cause to have issued and served upon the operator alleged to be committing such violation, a formal



complaint which includes a statement of the manner in and the extent to which said operator is alleged to be violating the provisions of this act. Such complaint may be served by certified mail, and return receipt signed by the lessee, an officer of a corporate lessee, or the designated agent of the lessee shall constitute service. The lessee shall answer the complaint and request a hearing before a designated hearing officer within thirty (30) days from receipt of the complaint if matters asserted in the complaint are disputed. If the lessee fails to answer the complaint and request a hearing, the matters asserted in the complaint shall be deemed admitted by the lessee, and the board may proceed to forfeit the bond in the amount necessary to reclaim affected lands and pay for any outstanding royalties and related administrative costs. The director of the department of lands is empowered to issue subpoenas. The hearing shall be conducted in accordance with chapter 52, title 67, Idaho Code. The hearing officer shall enter an order in accordance with chapter 52, title 67, Idaho Code. Appeal to a district court shall be in accordance with chapter 52, title 67, Idaho Code.

(d) Cancel the lease in accordance with section 47-707, Idaho Code.

(2) In addition to the injunctive remedies of subsection (1)(a) of this section,

(a) Proceed in the first instance by legal action in the name of the state of Idaho to recover from an operator who without bond has conducted or is conducting exploration with heavy equipment on state lands, including lands between the ordinary high watermarks of navigable rivers, the cost of repairing damage to and reclaiming the affected state lands in accordance with section 47-703A(2), Idaho Code, and rules adopted pursuant thereto; or if the bond on file with the department of lands is not sufficient to adequately reclaim the affected state lands, to recover the cost in excess of the bond to reclaim the affected state lands in accordance with section 47-703A(2), Idaho Code, and rules adopted pursuant thereto.

(b) Proceed by legal action in the name of the state of Idaho to recover from an operator who has removed minerals in commercial quantities from state lands, including lands between the ordinary high watermarks of navigable rivers, in violation of the provisions of section 47-717, Idaho Code, damages in the amount of the prevailing royalty rate set by the board of land commissioners for the particular mineral removed plus interest from the date of removal at the average annual interest rate of the investment board from the date of removal to judgment.

(3) In addition to any other penalties or injunctive remedies of this chapter, any person, firm, or corporation who violates any of the provisions of this chapter or rules adopted pursuant thereto, or who fails to perform the duties imposed by these provisions, or who violates any determination or order promulgated pursuant to the provisions of this chapter, shall be liable to a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each day during which any provision of this chapter, rule or order has been or is being violated. All sums recovered shall be credited to the general fund.

(4) An appeal from a final judgment of the district court shall be taken in the manner provided by law for appeals in civil cases. [I.C., § 47-718, as

added by 1981, ch. 325, § 6, p. 676; am. 1989, ch. 262, § 2, p. 639; am. 1993, ch. 216, § 43, p. 587.]

**Compiler's notes.** Section 5 of S.L. 1981, ch. 325 is compiled as § 47-704.

Sections 42 and 44 of S.L. 1993, ch. 216 are compiled as §§ 47-324 and 47-1318, respectively.

Section 7 of S.L. 1981, ch. 325 declared an emergency. Approved April 7, 1981.

## CHAPTER 8

### OIL AND GAS LEASES ON STATE AND SCHOOL LANDS

#### SECTION.

- 47-801. Lease of state or school lands for oil and gas development — Surface rights.
- 47-802. Rules and regulations governing leases and mining operations.
- 47-803. [Repealed.]
- 47-804. Limitation on area covered by lease — Right to hold more than one lease.
- 47-805. Annual rental — Amount — Minimum royalty.
- 47-806. Lease of lands for grazing or agricultural purposes — Rights of lessee under oil or gas lease.

#### SECTION.

- 47-807. Assignment or transfer of leases restricted.
- 47-808. Bond.
- 47-809. Cancellation of oil and gas leases for noncompliance with conditions — Procedure — Termination of lease by lessee.
- 47-810. Grants executed in accordance with constitution.
- 47-811. Cooperative development of oil and gas lands.
- 47-812. Application of section 47-707 limited.

**47-801. Lease of state or school lands for oil and gas development — Surface rights.** — The state board of land commissioners is hereby authorized and empowered to lease for a term of ten (10) years, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline or other hydrocarbons, or any of them, is produced in paying quantities, or as much longer thereafter as the lessee in good faith shall conduct drilling operations thereon, any state or school lands which may contain oil, gas, casinghead gas, casinghead gasoline, or other hydrocarbons, together with the right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to the prospecting for, exploration for, drilling for, production, refining and marketing of said oil, gas, casinghead gas, casinghead gasoline or other hydrocarbons produced from said lands, including the right to construct and maintain thereon all works, buildings, plants, waterways, roads, communication lines, pipelines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof for the purposes of the lease. [1937, ch. 130, § 1, p. 200; am. 1949, ch. 128, § 1, p. 226.]

**Compiler's notes.** Section 2 of S.L. 1949, ch. 128, repealed § 3 of S.L. 1937, ch. 130, as amended by ch. 79 of S.L. 1945 (47-803).

**Sec. to sec. ref.** This section is referred to in § 47-812.

**Collateral References.** 38 Am. Jur. 2d, Gas and Oil, § 283.

78 C.J.S., Schools and School Districts, §§ 11, 376, 377.

Petroleum development and production on park property. 144 A.L.R. 507.

Use of school property for other than public school or religious purposes. 94 A.L.R.2d 1274.



**47-802. Rules and regulations governing leases and mining operations.** — State board of land commissioners is hereby authorized and empowered to make and establish rules and regulations governing the issuance of oil and gas leases under the provisions of this act and covering the conduct of development and mining operations to be carried on thereunder. [1937, ch. 130, § 2, p. 200.]

**Compiler's notes.** The words "this act" refer to S.L. 1937, ch. 130, which is compiled as §§ 47-801, 47-802, 47-804 — 47-810.

**47-803. Conditions for drilling operations — Extension of time.**  
**[Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1937, ch. 130, § 3, was repealed by S.L. 1949, ch. 128, § 2.

**47-804. Limitation on area covered by lease — Right to hold more than one lease.** — No single oil and gas lease given and granted under the provisions of this act shall be for an area exceeding one (1) section, provided that one (1) person, firm or corporation may hold more than one lease. [1937, ch. 130, § 4, p. 200; am. 1949, ch. 128, § 3, p. 226.]

**Compiler's notes.** The words "this act" probably refer to §§ 47-801 — 47-812.

**47-805. Annual rental — Amount — Minimum royalty.** — Oil and gas leases shall be issued at an annual rental of not less than twenty-five cents (25¢) per acre, payable in advance, and royalty on oil and gas lands shall not be less than twelve and one-half per cent (12½%) of oil and/or gas produced and saved from said lands under said lease. Royalties shall be paid in addition to rental payments, at the discretion of the board of land commissioners. [1937, ch. 130, § 5, p. 200; am. 1949, ch. 128, § 4, p. 226; am. 1974, ch. 106, § 1, p. 1246; am. 1985, ch. 125, § 1, p. 309.]

**47-806. Lease of lands for grazing or agricultural purposes — Rights of lessee under oil or gas lease.** — The state board of land commissioners shall have the right to lease state or school lands for grazing or agriculture purposes, as otherwise provided, and to issue oil and gas leases covering lands leased for grazing or agricultural purposes, provided, however, that the lessee under any oil and gas lease issued under the provisions of this act shall have paramount right to the use of so much of the surface of the land as shall be necessary for the purposes of his lease and shall have the right of ingress and egress at all times during the term of said lease. [1937, ch. 130, § 6, p. 200.]

**Compiler's notes.** For sections in which "this act" is compiled see compiler's note, § 47-802.

**47-807. Assignment or transfer of leases restricted.** — No oil and gas lease made under the provisions of this act shall be assignable or transferable except upon the written consent of the board. [1937, ch. 130, § 7, p. 200.]

**Compiler's notes.** For sections in which "this act" is compiled see compiler's note, § 47-802.

**47-808. Bond.** — (1) The board shall require the execution of a good and sufficient bond in an amount the board determines reasonable which shall not be less than one thousand dollars (\$1,000) in favor of the state of Idaho conditioned on the payment of all damages to the surface and improvements thereon, whether or not the lands have been sold or leased for any other purposes.

(2) Upon commencement of operations for the drilling of any well, lessee shall be required by the board to furnish such a bond the board determines reasonable which shall not be less than six thousand dollars (\$6,000) which bond shall be in lieu of the bond required in subsection (1) of this section and shall cover all subsequent operations on said lease. [1937, ch. 130, § 8, p. 200; am. 1949, ch. 128, § 5, p. 226; am. 1992, ch. 160, § 1, p. 516.]

**47-809. Cancellation of oil and gas leases for noncompliance with conditions — Procedure — Termination of lease by lessee.** — (a) The state board of land commissioners shall reserve and may exercise the authority to cancel any oil and gas lease upon failure by the lessee to exercise due diligence and care in the prosecution of his operations in accordance with the terms and conditions stated in said lease and with all laws of the state of Idaho, and shall insert in every such lease appropriate provisions for its cancellation by the board in the event of noncompliance upon the part of the lessee; provided, however, that except in the instance of nonpayment of rentals or royalties, no such lease shall be cancelled by the board other than for a substantial violation of the terms thereof and unless it shall notify the lessee in writing of the existence and exact nature of the cause of cancellation and unless the lessee thereafter, and within ninety (90) days from the mailing of such notice by registered mail, shall fail to remedy such cause for cancellation; and provided further that no default by the lessee in the performance of any of the conditions or provisions of such lease as to any well or wells on any legal subdivision of the land covered by such lease shall affect the right of the lessee to continue the lessee's possession or operation of any other well or wells, situated upon any other legal subdivision of said land. The term "legal subdivision" as herein used shall mean a subdivision as established by the United States Land Survey which most nearly approximates in size the area allocated to one well under any approved well spacing program; provided that if no special program has been approved, said term "legal subdivision" shall mean the parcel upon which such well shall be located, but in any event not less than forty (40) acres surrounding such well.

(b) The lessee of any such oil and gas lease may surrender and terminate the lease as to all or any part of the lands covered by the same upon payment



of the rentals then accrued and upon giving notice in writing, not less than thirty (30) days prior to such surrender or termination, to the state board of land commissioners and thereupon lessee shall be relieved from liability for rental and all other obligations as to the acreage so surrendered; provided, however, that such surrender shall not thereby relieve the lessee of any liabilities which may have accrued in connection with the lease prior to the surrender of such acreage. In the event of a partial surrender of the lands covered by such lease, the annual rental thereafter payable shall be reduced proportionately. [1937, ch. 130, § 9, p. 200; am. 1949, ch. 128, § 6, p. 226.]

**47-810. Grants executed in accordance with constitution.** — All grants and permissions under this act shall be executed as required by the Constitution of the State of Idaho, Article IV, Section 16. [1937, ch. 130, § 10, p. 200.]

**Compiler's notes.** For sections in which "this act" is compiled see compiler's note, § 47-802. Section 11 of S.L. 1937, ch. 130 repealed §§ 46-704, 46-705, Idaho Code Annotated.

**47-811. Cooperative development of oil and gas lands.** — The state board of land commissioners is authorized to join on behalf of the state of Idaho in cooperative or unit plans of development or operation on oil and gas pools with the United States government and its lessees or permittees and with others in such form as may be acceptable to it to modify or amend the same from time to time as in its judgment it may deem advisable, to consent to and approve the designated participating area and any extension or contraction thereof and to do all acts and things which it considers necessary or advisable to make operative such unit plan or plans; and for such purposes the board is hereby authorized with the consent of its lessees to modify and change any and all terms of leases issued by it to facilitate the efficient and economical production of oil or gas from the lands under its jurisdiction; provided, however, that said board shall not use or contract to use funds under its control for the purpose of drilling or otherwise paying the cost of development of oil and gas. [1949, ch. 128, § 7, p. 226.]

**47-812. Application of section 47-707 limited.** — Section 47-707 shall not be construed to apply to oil and gas leases issued under the authority of section 47-801. [1949, ch. 128, § 8, p. 226.]

CHAPTER 9

RIGHTS OF WAY AND EASEMENTS FOR DEVELOPMENT OF MINES

SECTION.	SECTION.
47-901. Right of way for mining purposes.	Trial by court if commissioners not appointed.
47-902. Right of way for mining purposes — Railroads, ditches, and tunnels.	47-906. Oath, view, and report of commissioners.
47-903. Action to condemn right of way.	47-907. Setting aside report.
47-904. Issuance and service of summons.	47-908. Rights upon payment of damages.
47-905. Appointment of commissioners —	

## SECTION.

47-909. Appeal from commissioners' award  
— Bond.

47-910. Trial on appeal.

47-911. Effect of appeal — Bond and deposit  
of damages.

## SECTION.

47-912. Costs of appeal.

47-913. Costs of proceedings.

**47-901. Right of way for mining purposes.** — The owner, locator or occupant of a mining claim, whether patented under the laws of the United States or held by location or possession, may have and acquire a right of way for ingress and egress, when necessary in working such mining claim, over and across the lands or mining claims of others, whether patented or otherwise. [1877, p. 70, § 1; R.S., § 3130; reen. R.C. & C.L., § 3223; C.S., § 5537; I.C.A., § 46-801.]

**Cited in:** Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho 1, 165 P. 1128 (1916).

## ANALYSIS

Purpose for which taken.  
Validity.

**Purpose for Which Taken.**

Fact that land sought to be condemned was held as a mining claim for prospective public use did not protect it from being condemned for public use. Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho 1, 165 P. 1128 (1916).

**Validity.**

State, under delegation of power in U. S. R. S., § 2338 (U. S. Code, tit. 30, § 43), was authorized to enact this chapter. Baillie v. Larson, 138 F. 177 (C.C.D. Idaho 1905).

**Collateral References.** 25 Am. Jur. 2d, Easements and Licenses, §§ 13-73.

58 C.J.S., Mines and Minerals, §§ 162, 166 et seq., 203, 204, 233 et seq., 324, 325.

Effect, as between lessor and lessee, of provision in mineral lease purporting to except or reverse a previously granted right of way or other easement through, over, or upon the premises. 49 A.L.R.2d 1191.

**47-902. Right of way for mining purposes — Railroads, ditches, and tunnels.** — When any mine or mining claim is so situated, that for the more convenient enjoyment of the same a road, railroad or tramway therefrom, or ditch or canal to convey water thereto, or a ditch, flume, cut or tunnel to drain or convey the waters or tailings therefrom, or a tunnel or shaft, may be necessary for the better working thereof, which road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, may require the use or occupancy of lands or mining grounds, owned, occupied or possessed by others than the person or persons or body corporate, requiring an easement for any of the purposes described, the owner, claimant or occupant of the mine or mining claim first above mentioned, is entitled to a right of way, entry and possession for all the uses and privileges for such road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, in, upon, through and across such other lands or mining claims, upon compliance with the provisions of this chapter. [1881, p. 266, § 1; R.S., § 3131; reen. R.C. & C.L., § 3224; C.S., § 5538; I.C.A., § 46-802.]

**Cross ref.** See notes, § 47-901.

**Cited in:** Marsh Mining Co. v. Inland Em-

pire Mining & Milling Co., 30 Idaho 11, 165 P. 1128 (1916).

**47-903. Action to condemn right of way.** — When the owner, claimant or occupant or any mine or mining claim desires to work the same, and it is necessary, to enable him to do so successfully and conveniently, that he



have a right of way for any of the purposes mentioned in the foregoing sections, if such right of way cannot be acquired by agreement with the claimant or owner of the lands or claims over, under, through, across or upon which he seeks to acquire such right of way, he may commence an action in the district court in and for the county in which such right of way, or some part thereof, is situated, by filing a verified complaint containing a particular description of the character and extent of the right sought, a description of the mine or claim of the plaintiff, and of the mine or claim and lands to be affected by such right of way or privilege, with the name of the occupant or owner thereof. He may also set forth any tender of compensation that he may have made, and demand the relief sought. [1877, p. 70, § 3; R.S., § 3132; am. 1899, p. 350, § 1; reen. R.C. & C.L., § 3225; C.S., § 5539; I.C.A., § 46-803.]

**Collateral References.** Eminent domain for development or operation of mines and mining industries. 54 A.L.R. 56.

**47-904. Issuance and service of summons.** — Upon the filing of such complaint the clerk must issue a summons as provided in other civil actions, and the same must be served in the manner prescribed by law for service in ordinary actions. [1877, p. 70, § 4; R.S., § 3133; am. 1899, p. 350, § 2; reen. R.C. & C.L., § 3226; C.S., § 5540; I.C.A., § 46-804.]

**Cross ref.** Form and service of summons, Idaho Rules of Civil Procedure, Rule 4(a).

**47-905. Appointment of commissioners — Trial by court if commissioners not appointed.** — At any time after the service of the summons the plaintiff may upon ten (10) days' notice to the defendant, apply to the district court or the judge thereof for the appointment of commissioners to assess the damages resulting from the grant of such right of way. If upon the hearing of such motion, and the affidavits and proofs offered by the respective parties, the judge shall be of the opinion that the plaintiff has made a prima facie case entitling him to the relief demanded in the complaint, or any part thereof, he shall appoint three (3) commissioners, who must be disinterested persons, residents of the county, to assess the damages resulting to the claims, mines or lands of the defendant. But if such commissioners are not applied for and appointed, or their award is not approved by the judge or court, or if an appeal is taken from their award as hereinafter provided, the action shall be tried and determined by the court, and the provisions of the Code of Civil Procedure applicable thereto shall govern the proceedings therein as in other civil actions. Either party shall be entitled to a jury trial and may move for a new trial and appeal as in other cases. [1877, p. 70, § 5; R.S., § 3134; am. 1899, p. 350, § 3; reen. R.C. & C.L., § 3227; C.S., § 5541; I.C.A., § 46-805.]

**Cross ref.** Appeals, § 13-201 et seq.

Condemnation proceedings in district court, §§ 7-701 — 7-721.

New trials, Idaho Rules of Civil Procedure, Rules 59(a).

**47-906. Oath, view, and report of commissioners.** — The commissioners so appointed must be sworn to faithfully and impartially discharge their duties, and must proceed without unreasonable delay to examine the premises and assess the damages resulting from such right or privilege prayed for, and report the amount of the same to the judge appointing them; and if such right of way affects the property of more than one person or company, such report must contain an assessment of damages to each company or person. [1877, p. 70, § 6; R.S., § 3135; reen. R.C. & C.L., § 3228; C.S., § 5542; I.C.A., § 46-806.]

**47-907. Setting aside report.** — For good cause shown, the judge may set aside the report of such commissioners and appoint three (3) other commissioners whose duty shall be the same as above mentioned. [1877, p. 70, § 7; R.S., § 3136; reen. R.C. & C.L., § 3229; C.S., § 5543; I.C.A., § 46-807.]

**47-908. Rights upon payment of damages.** — Upon the payment of the sum assessed as damages as aforesaid, to the persons to whom it is awarded, or a tender thereof to them, then the person petitioning as aforesaid, is entitled to the right of way prayed for in his petition, and may immediately proceed to occupy the same and erect thereon such works and structures, and make therein such excavations, as may be necessary to the use and enjoyment of the right of way so awarded. [1877, p. 70, § 8; R.S., § 3137; reen. R.C. & C.L., § 3230; C.S., § 5544; I.C.A., § 46-808.]

**Collateral References.** Damages for flooding of mineral lands in exercise of right of eminent domain. 106 A.L.R. 955.

**47-909. Appeal from commissioners' award — Bond.** — Appeals from the assessment of damages made by the commissioners may be made and prosecuted in the proper district court by any party interested, at any time within ten (10) days after the filing of the report of the commissioners. A written notice of such appeal must be served upon the appellee in the same manner as summons is served in civil actions. The appellant must file with the clerk of the court to which the appeal is taken, a bond with sureties to be approved by the clerk in the amount of the assessment appealed from in favor of the appellee, conditioned that the appellant will pay any costs that may be awarded to the appellee, and abide any judgment that may be rendered in the cause. [1877, p. 70, § 9; R.S., § 3138; reen. R.C. & C.L., § 3231; C.S., § 5545; I.C.A., § 46-809.]

**Cross ref.** Service of summons, Idaho Rules of Civil Procedure, Rule 4(a).

**47-910. Trial on appeal.** — An appeal brings before the district court the necessity of the right of way or easement for the successful and convenient working of the mining claim and the amount of damages; and upon such appeal the case must be tried anew, and either party is entitled



to a jury. [1877, p. 70, § 10; R.S., § 3139; reen. R.C. & C.L., § 3232; C.S., § 5546; I.C.A., § 46-810.]

**47-911. Effect of appeal — Bond and deposit of damages.** — The prosecution of an appeal from the award of the commissioners or from the judgment of the district court does not hinder, delay or prevent the plaintiff from exercising all the rights and privileges granted by the award or judgment, if he deposit with the clerk of the district court the full amount of the damages awarded or adjudged the defendant, and execute and deliver to the clerk a bond with sufficient sureties to be approved by the clerk, in an amount to be fixed by the judge of the district court, conditioned to pay to the defendant any additional amount, over and above the amount so deposited that the defendant may recover, and all costs to which he may be entitled under the provisions of this chapter. At any time after such deposit and before the final determination of the action the defendant may, upon demand, receive from the clerk the amount so deposited, but his acceptance of the same or any part thereof, shall bar any further prosecution of the appeal, and shall be deemed an acquiescence and consent to the award and judgment, and the defendant shall not be entitled to any costs subsequent to the judgment. [1877, p. 70, § 11; R.S., § 3140; am. 1899, p. 350, § 4; reen. R.C. & C.L., § 3233; C.S., § 5547; I.C.A., § 46-811.]

**47-912. Costs of appeal.** — If the defendant recover judgment against the necessity of the easement, or for fifty dollars (\$50.00) more damages than the plaintiff has tendered him as provided in the next section, or for fifty dollars (\$50.00) more damages than the commissioners or judgment of the district court awarded him, he shall recover the costs of the appeal, otherwise he must pay all such costs. [1877, p. 70, § 12; R.S., § 3141; am. 1899, p. 350, § 5; reen. R.C. & C.L., § 3234; C.S., § 5548; I.C.A., § 46-812.]

**47-913. Costs of proceedings.** — The costs and expenses of proceedings under the provisions of this chapter, except as herein otherwise provided, must be paid by the party making the application: provided, that if the applicant before the commencement of such proceedings has tendered to the parties owning or occupying the lands or mining claims, a sum equal to or more than the amount of damages recovered, all of the costs and expenses must be paid by the party or parties owning the land or claims affected by such right of way, and who appeared and resisted the claim of the applicants thereto. [1877, p. 70, § 13; R.S., § 3142; reen. R.C. & C.L., § 3235; C.S., § 5549; I.C.A., § 46-813.]

## CHAPTER 10

### MINING TUNNELS

#### SECTION.

47-1001. Right to cross located claim.

47-1002. Owner of intersected claim may inspect tunnel.

47-1003. Title to ore taken from intersected claim.

#### SECTION.

47-1004. Burden of proof as to discovered vein.

**47-1001. Right to cross located claim.** — Any person or company who has or who may hereafter have a tunnel or crosscut, the mouth of which is located upon his own ground or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of the tunnel, but not to follow or drive upon any vein belonging to the owner of such claim. [1899, p. 442, § 1; reen. R.C. & C.L., § 3236; C.S., § 5550; I.C.A., § 46-901.]

**Constitutionality and Validity.**

This act, in granting to owners of ground having a tunnel located thereon right to run same through claims of others on payment of actual damages, is not subject to objection of depriving any person of property without due process of law. *Baillie v. Larson*, 138 F. 177 (C.C.D. Idaho 1905).

Enactment of this law is authorized by U. S. Code, tit. 30, § 43, providing that, as a condition of sale of mineral lands, local legislature of any state may prescribe rules for working

mines, involving easements, drainage, and other necessary means to their complete development. *Baillie v. Larson*, 138 F. 177 (C.C.D. Idaho 1905).

**Collateral References.** 58 C.J.S., *Mines and Minerals*, §§ 48, 49, 83.

Right of owner of title to, or an interest in, minerals under one tract to use the passages therein for transporting minerals taken from another tract or to use of surface in connection with mining of other tract. 83 A.L.R.2d 665.

**47-1002. Owner of intersected claim may inspect tunnel.** — Each tunnel or crosscut may be driven and worked for the purpose of drainage and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected, or his duly authorized agent, shall have the right to enter such tunnel upon application to the owner or owners or person in charge of said tunnel, without resorting to any process of law, for the purpose of making a survey and inspecting such vein or veins as may be crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulkheading, damming back, or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims without the consent of the owner or owners thereof, it shall work a forfeiture of all rights granted under the preceding section. [1899, p. 442, § 2; reen. R.C. & C.L., § 3237; C.S., § 5551; I.C.A., § 46-902.]

**47-1003. Title to ore taken from intersected claim.** — If any ore, the property of the owner of the claim intersected or crossed, be extracted in driving such tunnel, it shall be the property of the owner of the vein from which it was taken and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel. [1899, p. 442, § 3; reen. R.C. & C.L., § 3238; C.S., § 5552; I.C.A., § 46-903.]

**47-1004. Burden of proof as to discovered vein.** — In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel, the burden of proving that the vein so discovered is not the property of the adverse claimant in such action shall be on the tunnel owner. [1899, p. 442, § 4; reen. R.C. & C.L., § 3239; C.S., § 5553; I.C.A., § 46-904.]



## CHAPTER 11

## PROCEEDING BY LIENHOLDER UPON UNPATENTED MINING CLAIM TO PREVENT FORFEITURE

## SECTION.

47-1101. Order for performance of assessment work.

## SECTION.

47-1102. Cost of assessment a lien.

**47-1101. Order for performance of assessment work.** — Whenever a judgment, attachment or mortgage creditor has a lien upon unpatented mining claims in this state and the annual assessment work required by the provisions of section 2324 of the Revised Statutes of the United States, as amended by act of congress of August 24, 1921, has not been performed upon such mining claims by the first day of June in any year, the judgment, attachment or mortgage creditor may apply to the court having jurisdiction for an order allowing such judgment, attachment or mortgage creditor to perform such annual assessment work upon such unpatented mining claims in order to prevent a forfeiture of such mining claims and to preserve the lien of the judgment, attachment or mortgage until the final issuance of sheriff's deed. [1911, ch. 174, § 1, p. 568; reen. C.L. 233:2; C.S., § 5554; am. 1923, ch. 8, § 1, p. 9; I.C.A., § 46-1001.]

**Compiler's notes.** For U. S. R. S., § 2324, referred to in this section, see U. S. Code (9 U.S.C.), tit. 30, § 28.

Section 2 of S.L. 1923, ch. 8 declared an emergency. Approved February 6, 1923.

**Collateral References.** 54 Am. Jur. 2d,

Mines and Minerals, §§ 256-259.

Assertion of a statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold. 59 A.L.R.3d 278.

**47-1102. Cost of assessment a lien.** — Upon the making of such order the judgment, attachment or mortgage creditor shall be authorized and empowered to incur all the expenses necessary in the performance of the annual assessment work upon such mining claims, and upon filing in the court in which such action is pending a verified statement of such expenses, the cost thereof shall be taxed in the action, suit or proceeding and become and be a lien upon said premises, and execution may issue therefor against said premises; provided, that no deficiency judgment shall be entered against the owner of said mining property for any portion of such expense if the proceeds of the sale thereof are insufficient to satisfy the same. [1911, ch. 174, § 2, p. 569; reen. C.L. 233:1; C.S., § 5555; I.C.A., § 46-1002.]

**Cross ref.** Lien of creditor of mining partnership, § 53-404.

**Collateral References.** 58 C.J.S., Mines and Minerals, § 423.

## CHAPTER 12

## LICENSE TAX FOR PRIVILEGE OF MINING AND EXTRACTING ORES

## SECTION.

47-1201. License tax to be measured by one percent of the net value of ores mined — Definition of royalty.

## SECTION.

47-1202. Net value of ore to be used as measure of tax — How determined.

## SECTION.

47-1203. Statement of net proceeds from mining or extracting ores —  
Or from royalty.

47-1204. Statement as to entire group.

47-1205. Definition of valuable mineral.

## SECTION.

47-1206. Payment of mine license tax.

47-1207. [Repealed.]

47-1208. Tax deficiency collection and enforcement procedures.

**47-1201. License tax to be measured by one percent of the net value of ores mined — Definition of royalty.** — (a) Tax on mining or on receiving royalties. For the privilege of mining in this state, both placer and rock in place, every person, copartnership, company, joint stock company, trust, corporation or association, however and for whatever purpose organized, engaged in mining, upon or receiving royalties from any quartz vein or lode, or placer or rock in place mining claim, in this state containing gold, silver, copper, lead, zinc, coal, phosphate, limestone, or other precious and valuable metals or minerals, or metal or mineral deposits, shall pay to the state of Idaho, in addition to all other taxes provided by law, a license tax equal in amount to one percent (1%) of the net value of the royalties received or the ores mined or extracted as determined under section 47-1202, Idaho Code, said tax to accrue during the taxable year that the product is sold or used and shall on the last day of such taxable year become a lien on property in this state of such person, copartnership, company, joint stock company, trust, corporation, or association, said tax to be due and payable on or before the fifteenth day of the fourth month following the close of the taxable year.

(b) Definition of royalties. For the purpose of paragraph (a) of this section and chapter, the word “royalties” shall be construed to mean the amount in money or value of property received based upon the quantity or value of minerals extracted by any person, copartnership, company, joint stock company, trust, corporation, or association, having any right, title or interest in or to any tract of land, or any economic interest in minerals as defined by section 613 of the Internal Revenue Code, in this state for which permission has been given to another to explore, mine, take out and remove ore therefrom.

(c) Definition of taxable year. The term “taxable year” with respect to any taxpayer means the taxable year elected for income tax purposes under the provisions of section 63-3010, Idaho Code. [1935 (1st E.S.), ch. 65, § 1, p. 182; am. 1941, ch. 106, § 1, p. 188; am. 1972, ch. 99, § 1, p. 209; am. 1977, ch. 93, § 1, p. 189; am. 2001, ch. 207, § 1, p. 703.]

**Compiler's notes.** Section 613 of the Internal Revenue Code referred to in subsection (b) of this section is compiled as 26 U.S.C., § 613.

**Cited in:** Lyons v. Bottolfsen, 61 Idaho 281, 101 P.2d 1 (1940); Idaho Portland Cement Co. v. Neill, 83 Idaho 66, 357 P.2d 654 (1960); Hecla Mining Co. v. Idaho State Tax Comm'n, 108 Idaho 147, 697 P.2d 1161 (1985).

## ANALYSIS

Ambiguity.  
Constitutionality.

Duplicate taxation.

“Placer” defined.

Purpose.

Title of act.

Value.

**Ambiguity.**

This act was held not to be incomplete, uncertain, ambiguous, and indefinite as to the property covered, the method of assessment, and the officer or board to assess and fix the tax. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).



**Constitutionality.**

When no effort was being made to enforce this act and no effort was contemplated unless it was first judicially determined that funds were available to pay the expense of administration or a legislative appropriation had been made for that purpose, an injunction would not lie to restrain the enforcement of such act and under such state of facts the constitutionality of such act should not have been passed upon. *United Mercury Mines Co. v. Pfost*, 57 Idaho 293, 65 P.2d 152 (1937).

This law, imposing a tax on mining, is not violative of Const., Art. 3, § 1, since all occupations and trades are the legitimate subject for taxation and it makes no difference whether mining is called a "privilege" or a "right," it is subject to taxation. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

An occupation tax applied only to mining operations did not lack uniformity since the imposition operated equally on all within the particular class so selected. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

A tax on the business of mining was held not subject to the contention that it was a property or ad valorem tax, not an excise or income tax, hence, in effect, a double ad valorem tax, or, if an excise tax, violative of Const., Art. 7, § 5 as double taxation. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**Duplicate Taxation.**

An occupation excise tax levied on miners, as against concurrently levied ad valorem and income taxes, all for the support of the public schools, did not result in duplicate taxation. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**"Placer" Defined.**

In suit to enjoin enforcement of occupation excise tax on mining, the word "placer" was held to tax both the privilege of lode and placer mining. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**Purpose.**

The legislature intended this act to tax the mining industry as an occupation on a net yearly output basis, as reported by the miner to the assessor, less certain defined deductions, such tax to be collected by the commissioner of law enforcement and paid into the public school fund. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**Title of Act.**

A contention that the title of this act was insufficient because it did not specify that the proceeds of the tax went into the public school fund and because it failed to specify that a duplicate copy of the statement required under § 63-2803 to be delivered to the commissioner of law enforcement was unconstitutional was held not good since the title advised that the body thereof fixed the distribution of the tax and the determination of its measure. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**Value.**

The claim that "value" must be determined and that there was no one authorized to determine it was erroneous because the statute provides that the tax is to be "equal in amount to three per cent of the value of the ores mined." *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938).

**Collateral References.** 58 C.J.S., Mines and Minerals, §§ 373, 374.

Tax redemption statutes applied to separate mineral estates. 56 A.L.R.2d 621.

**47-1202. Net value of ore to be used as measure of tax — How determined.** — For the purpose of measuring and determining the amount of tax to be paid under the provisions of section 47-1201, Idaho Code, the royalties as defined in subsection (b) of section 47-1201, Idaho Code, or the net value of ore mined shall be computed under one (1) of the following methods at the election of the taxpayer. Such election, once made, shall be binding for all succeeding years unless the taxpayer secures permission from the state tax commission to change to another method:

(a) Ores mined within the state shall be valued by deducting from the gross value of the ore, all costs of mining and processing such ore, using the formula prescribed in section 613 of the Internal Revenue Code and Treasury Regulation 1.613-5 for computation of the net income from mining for depletion purposes, less the deduction of depletion as computed under section 613 of the Internal Revenue Code and Treasury Regulation 1.613-5;

or

(b) Ores mined within the state shall be valued using the gross value determined by the U.S. Department of the Interior for computation of the value of minerals on public lands for federal royalty purposes, less the following deductions:

- (1) all costs of mining and transporting such ore to the point at which the value for federal royalty purposes is determined by measurement of the quantity of ore mined; these costs to include only those directly incurred in and attributable to the actual mining and transportation operation in the state of Idaho, and
- (2) the applicable portion of the federal deduction for depletion, allocated on the ratio of the gross value of the ore used for this computation, to the gross value of the ore used in the federal depletion computation. [1935 (1st E.S.), ch. 65, § 2, p. 182; am. 1941, ch. 106, § 2, p. 188; am. 1972, ch. 99, § 2, p. 209; am. 1973, ch. 43, § 1, p. 78; am. 1977, ch. 93, § 2, p. 189; am. 1996, ch. 381, § 1, p. 1293.]

**Compiler's notes.** Section 613 of the Internal Revenue Code referred to in subdivision (a) of this section is compiled as 26 U.S.C. § 613.

Section 2 of S.L. 1973, ch. 43 declared an emergency and provided for application of the act retroactive to January 1, 1972. Approved February 26, 1973.

Section 2 of S.L. 1996, ch. 381 declared an emergency. Approved March 20, 1996.

Cited in: Idaho Gold Dredging Co. v.

Balderston, 58 Idaho 692, 78 P.2d 105 (1938); Hecla Mining Co. v. Idaho State Tax Comm'n, 108 Idaho 147, 697 P.2d 1161 (1985).

#### **Depreciation of Improvements.**

Under this section deductions for depreciation of improvements are permissible, even though annual deductions were also made, under the original act as moneys expended for improvements. Day Mines, Inc. v. Lewis, 70 Idaho 131, 212 P.2d 1036 (1949).

**47-1203. Statement of net proceeds from mining or extracting ores — Or from royalty.** — (a) Every person, copartnership, company, joint stock company, trust, corporation, or association mining or receiving royalties from any quartz vein or lode, or placer or rock in place mining claim, containing gold, silver, copper, lead, zinc, coal, phosphate, limestone, or other precious or valuable minerals or metals, or mineral or metal deposits, must, on or before the fifteenth day of the fourth month following the close of the taxable year make a tax return to the state tax commission, stating specifically the items of income and the deductions allowed by this act. For the purpose of enforcing this act, the income tax returns filed in accordance with the provisions of the Idaho Income Tax Act shall be open to inspection by the officer designated to enforce this act.

(b) In the event the taxpayer is entitled to an automatic extension of time to file the income tax return under section 63-3033, Idaho Code, an automatic six (6) month extension is granted to file the return required under this act. In all cases of an extension of time in which to file any return, interest shall be paid on any tax due from due date to date of payment at the rate provided in section 63-3045, Idaho Code. [1935 (1st E.S.), ch. 65, § 3, p. 182; am. 1941, ch. 106, § 3, p. 188; am. 1972, ch. 99, § 3, p. 209; am. 1977, ch. 93, § 3, p. 189; am. 1982, ch. 179, § 1, p. 466; am. 2000, ch. 26, § 1, p. 45.]



**Compiler's notes.** The "Idaho Income Tax Act" is compiled as §§ 63-3001 — 63-3088.

The words "this act" probably refer to §§ 47-1201 — 47-1204, 47-1206, 47-1208.

Section 4 of S.L. 1977, ch. 93 is compiled as § 47-1205.

Section 2 of S.L. 1982, ch. 179 is compiled as § 47-1208.

Section 2 of S.L. 2000, ch. 26, is compiled as § 48-603B.

Section 4 of S.L. 1941, ch. 106 declared an emergency. Approved Mar. 7, 1941.

Section 8 of S.L. 2000, ch. 26 declared an emergency retroactively to January 1, 2000 and approved March 3, 2000.

#### ANALYSIS

Ascertainment of tax.

Constitutionality.

Powers of collecting officer.

#### Ascertainment of Tax.

This act is not void for failing to designate

any officer or body to ascertain the tax. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

#### Constitutionality.

This act is not unconstitutional for uncertainty since it identifies the ore or mineral the net value of which determines the amount of tax to be paid. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

This act is not a denial of due process of law. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

#### Powers of Collecting Officer.

The fact that the commissioner of law enforcement asked for more information than was contained in required reports was not such an enlargement of, or departure from, his necessarily implied powers as collecting officer as to render his acts in this regard unconstitutional. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

**47-1204. Statement as to entire group.** — Where the same person or persons are operating or leasing to another two (2) or more mines or mining claims under one (1) general system of mining or development, a duplicate copy of the statement herein provided, and the tax herein levied, shall be made as to such entire group and need not be made as to each particular mining claim constituting said group, as provided by section 63-2804. [1935 (1st E. S.), ch. 65, § 4, p. 182; am. 1972, ch. 99, § 4, p. 209.]

**Compiler's notes.** Section 5 of S.L. 1972, ch. 99 declared an emergency retroactive to January 1, 1972. Approved March 6, 1972.

**47-1205. Definition of valuable mineral.** — The term "valuable mineral" for purposes of this act, shall be deemed to include not only gold, silver, copper, lead, zinc, coal, phosphate and limestone, but also any other substance not gaseous or liquid in its natural state, which makes real property more valuable by reason of its presence thereon or thereunder and upon which depletion is allowable pursuant to section 613 of the Internal Revenue Code, provided, however, that sand and gravel are not included in this definition. [I.C., § 47-1205, as added by 1977, ch. 93, § 4, p. 189.]

**Compiler's notes.** A former § 47-1205, which comprised S.L. 1935 (1st E.S.), ch. 65, § 5, p. 182, was repealed by S.L. 1969, ch. 311, § 3.

Section 613 of the Internal Revenue Code referred to in this section is compiled as 26 U.S.C. § 613.

The words "this act" probably refer to §§ 47-1201 — 47-1206, 47-1208.

Section 3 of S.L. 1977, ch. 93 is compiled as § 47-1203.

**Sec. to sec. ref.** This section is referred to in § 47-1704.

**47-1206. Payment of mine license tax.** — The license tax imposed herein shall be paid to the state tax commission on or before the due date of

the return and the commission shall receipt therefor and promptly turn same over to the state treasurer, as other receipts of its office, and the state treasurer shall place sixty-six percent (66%) to the credit of the general fund of the state and thirty-four percent (34%) to the credit of the abandoned mine reclamation account created by the provisions of section 47-1703, Idaho Code. [1935 (1st E.S.), ch. 65, § 6, p. 182; am. 1939, ch. 173, § 8, p. 320; am. 1969, ch. 311, § 1, p. 966; am. 1977, ch. 93, § 5, p. 189; am. 1999, ch. 44, § 1, p. 105.]

**Compiler's notes.** Section 6 of S.L. 1939, ch. 173 read: "Proceeds from the chain store tax, mine license tax, liquor fund, and beer tax now distributed to the public school income fund shall on and after July 15, 1939, be covered into the general fund. To conform to this change, the amendments embodied in the four following sections (§§ 7-10 of said act) are enacted."

Sections 7 and 9 of S.L. 1939, ch. 173 were compiled as §§ 63-2411, 23-404, which have been repealed.

Section 2 of S.L. 1969, ch. 311 is compiled herein as § 47-1208.

Section 6 of S.L. 1977, ch. 93 is compiled as § 47-1208.

Section 11 of S.L. 1939, ch. 173 read: "Whereas school finances for the school year 1938-39 have been budgeted on anticipated revenues provided by existing laws, the amendments made thereto in sections 7 to 10, inclusive, of this act shall be in force and take effect on July 15, 1939."

**Cross ref.** See notes, § 47-1203. Idaho Gold Dredging Co. v. Balderston, 58 Idaho 692, 78 P.2d 105 (1938).

#### **47-1207. Failure to file copy of net proceeds — Failure to pay license tax — Triple liability — Injunction. [Repealed.]**

**Compiler's notes.** This section, which comprised S.L. 1935 (1st E.S.), ch. 65, § 7, p. 182, was repealed by S.L. 1969, ch. 311, § 3.

**47-1208. Tax deficiency collection and enforcement procedures.** — The deficiency in tax and notice of deficiency as well as the collection and enforcement procedures provided by the Idaho income tax act, sections 63-3030A, 63-3033, 63-3038, 63-3039, 63-3040, 63-3042 through 63-3065A, 63-3068, 63-3069, 63-3071, 63-3072, 63-3073 and 63-3075 through 63-3078, Idaho Code, shall apply and be available to the state tax commission for enforcement of the provisions of this act and the assessment and collection of any amounts due. Said sections shall for this purpose be considered a part of this act and wherever liens or any other proceedings are defined as income tax liens or proceedings they shall, when applied in enforcement or collection under this act, be described as a license tax for the privilege of mining lien or proceeding.

The state tax commission may be made a party defendant in an action at law or in equity by any person aggrieved by the unlawful seizure or sale of his property, or in any suit for refund or to recover an overpayment, but only the state of Idaho shall be responsible for any final judgment secured against the state tax commission, and said judgment shall be paid or satisfied out of the state refund account created by section 63-3067, Idaho Code. [I.C., § 47-1208, as added by 1969, ch. 311, § 2, p. 966; am. 1977, ch.



93, § 6, p. 189; am. 1979, ch. 48, § 2, p. 137; am. 1982, ch. 179, § 2, p. 466; am. 1986, ch. 73, § 6, p. 201; am. 1986, ch. 92, § 1, p. 269.]

**Compiler's notes.** This section was amended by two 1986 acts, ch. 73, § 6 and ch. 92, § 1, which appear to be compatible and have been compiled together. The amendment by ch. 73, § 6 in the second paragraph substituted "account" for "fund" preceding "created by section 63-3067, Idaho Code." The amendment ch. 92, § 1 in the first paragraph added "63-3030A" following "income tax act" and "63-3069" preceding "63-3071" and "63-3072, 63-3073" following "63-3071".

Section 1 of S.L. 1969, ch. 311 is compiled as § 47-1206.

Section 3 of S.L. 1969, ch. 311 repealed §§ 47-1205, 47-1207.

Section 5 of S.L. 1977, ch. 93 is compiled as § 47-1206.

Section 1 of S.L. 1979, ch. 48 is compiled as § 63-3076.

Section 1 of S.L. 1982, ch. 179 is compiled as § 47-1203.

Sections 5 and 7 of S.L. 1986, ch. 73 are compiled as §§ 23-1319 and 50-1049, respectively.

Section 7 of S.L. 1977, ch. 93 read, "(a) An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactive to January 1, 1977.

"(b) If a taxpayer is filing a mine license tax return for a taxable year other than a taxpayer's income tax taxable year, a change to conform the mine license tax taxable year to the income tax taxable year shall be made as follows: A mine license tax return shall be filed for a twelve (12) month period ending on the last day of the income tax taxable year ending in 1977. From the mine license tax computed for such period, credit may be taken

for the tax, prorated on a monthly basis, attributable to the period beginning with the first day of the income tax taxable year commencing in 1976 and ending on the last day of the mine license tax taxable year ending in 1976.

"Example: The income tax taxable year is a fiscal year ending June 30. The mine license tax taxable period is a calendar year. The mine license tax for 1976 is six hundred dollars (\$600). The mine license tax for the twelve (12) month period ending June 30, 1977, computed on the return filed to conform to the income tax taxable year, is four hundred dollars (\$400). The tax liability for the taxable year ending June 30, 1977 is one hundred dollars (\$100), computed as follows:

"Tax computed for the twelve month period ending 6-30-77 ..... \$400

"Less credit for  $\frac{1}{12}$  of \$600 ..... 300

"Tax due for taxable year ending 6-30-77 ..... \$100

"(c) Nothing herein shall be interpreted as a change in legislative intent with regard to the taxation of royalties, determination of value, definition of mining, or the definition of valuable mineral, including the definition of valuable mineral as including phosphate and limestone, but instead these provisions herein relating to these matters shall be interpreted as a clarification of existing law as previously enacted." Approved March 17, 1977.

Section 3 of S.L. 1982, ch. 179 declared an emergency and made the act effective retroactively to January 1, 1982. Approved March 23, 1982.

**Cited in:** Hecla Mining Co. v. Idaho State Tax Comm'n, 108 Idaho 147, 697 P.2d 1161 (1985).

## CHAPTER 13

### DREDGE MINING

#### SECTION.

47-1301 — 47-1311. [Repealed.]

47-1312. Policy.

47-1313. Definitions.

47-1314. Disturbed lands to be restored —  
Notice and restoration of  
placer or dredge exploration  
operations.

47-1315. Water clarification.

47-1316. Administrative agency.

47-1317. Application, permit and bond required.

#### SECTION.

47-1318. Termination of permits — Hearing.

47-1319. Bond forfeiture on default.

47-1320. Hearing procedures and appeals.

47-1321. [Repealed.]

47-1322. Title.

47-1323. Dredge mining of water bodies making up the national wild and scenic rivers system prohibited.

47-1324. Enforcement and penalties for violation.

**47-1301 — 47-1311. Dredge mining procedure. [Repealed.]**

**Compiler's notes.** These sections which comprised S.L. 1953, ch. 183, §§ 1-10, 12 were repealed by S.L. 1955, Init. Meas., § 12.

**47-1312. Policy.** — It is hereby declared to be the policy of the state of Idaho to protect the lands, streams and watercourses within the state, from destruction by dredge mining and by placer mining, and to preserve the same for the enjoyment, use and benefit of all of the people, and that clean water in the streams of Idaho is in the public interest. [1955 Init. Meas., § 1; am. 1969, ch. 281, § 1, p. 845.]

**Compiler's notes.** This initiative proposal was submitted to vote of the people at general election on November 2, 1954. It was adopted by a majority of the aggregate vote cast, 174,377 votes being cast for the proposal and 30,102 votes being cast against said proposal. Governor's Proclamation dated November 24, 1954 declared the same to have been approved by the people.

**Sec. to sec. ref.** This chapter is referred to in §§ 38-1312, 47-703A, and 47-704.

**ANALYSIS**

Application to federal mining claim.

Police power.

Time of restoration.

**Application to Federal Mining Claim.**

In that this act is in harmony with the goal of federal legislation that the development of mining industries be carried out so as to minimize the adverse impact on environmental quality, the act is applicable to operators of dredge or placer mines on unpatented federal

property. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

**Police Power.**

The policy declared in this section bears a reasonable relationship to the public health or welfare so that the enactment is within the legitimate police power of the state. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

**Time of Restoration.**

The last sentence of § 47-1314, when construed in favor of the reasonable operation of the statute, does not act to halt restoration until after mining operations have been concluded since the purpose of the Dredge and Placer Mining Act, as set forth in this section, would be emasculated if that interpretation were adopted. State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

**Collateral References.** 58 C.J.S., Mines and Minerals, §§ 335, 362-370, 381, 383.

**47-1313. Definitions.** — As used in this chapter:

(a) "Board" means the state board of land commissioners or such representative as may be designated by the board.

(b) "Director" means the director of the department of lands or such representative as may be designated by the director.

(c) "Disturbed land" means land, natural watercourses, or existing stockpiles and waste piles affected by placer or dredge mining, re-mining, exploration, stockpiling of ore or wastes from placer or dredge mining, or construction of roads, tailings ponds, structures, or facilities appurtenant to placer or dredge mining operations.

(d) "Mineral" means any ore, rock, or substance extracted from a placer deposit or from an existing placer stockpile or waste pile, but does not include coal, clay, stone, sand, gravel, phosphate, uranium, oil, or gas.

(e) "Motorized earth-moving equipment" means backhoes, bulldozers, front loaders, trenchers, core drills, suction dredges with an intake diameter exceeding eight (8) inches, and other similar equipment.



(f) "Natural watercourse" means any stream in the state of Idaho having definite bed and banks, and which confines and conducts continuously flowing water.

(g) "Permit area" means that area designated under section 47-1317, Idaho Code, as the site of a proposed placer or dredge mining operation, including all lands to be disturbed by the operation.

(h) "Person" means any person, corporation, partnership, association, or public or governmental agency engaged in placer or dredge mining, whether individually, jointly, or through subsidiaries, agents, employees, or contractors.

(i) "Placer deposit" means naturally occurring unconsolidated surficial detritus containing valuable minerals, whether located inside or outside the confines of a natural watercourse.

(j) "Placer or dredge exploration operation" means activities including, but not limited to, the construction of roads, trenches, and test holes, performed on a placer deposit for the purpose of locating and determining the economic feasibility of extracting minerals by placer or dredge mining.

(k) "Placer or dredge mining" or "dredge or other placer mining" means the extraction of minerals from a placer deposit, including remining for sale, processing, or other disposition of earth material excavated from previous placer or dredge mining. The term "dredge or other placer mining," wherever used in this chapter, is subject to this definition and all provisions regarding it.

(l) "Placer or dredge mining operation" means placer or dredge mining which disturbs in excess of one-half ( $\frac{1}{2}$ ) acre of land.

(m) "Road" means a way, including bed, slopes, and shoulders, (1) constructed within the circular tract circumscribed by a placer or dredge mining operation, or (2) constructed solely for access to a placer or dredge mining operation or placer or dredge exploration operation, provided, that a way dedicated to public multiple use or being used by a governmental land manager or private landowner at the time of cessation of operations, and not constructed solely for access to a placer or dredge mining operation or placer or dredge exploration operation, shall not be considered a road for purposes of this act. [I.C., § 47-1313, as added by 1984, ch. 102, § 2, p. 232.]

**Compiler's notes.** Former § 47-1313, which comprised 1955 Init. Meas., § 2; am. 1969, ch. 281, § 2, p. 845, was repealed by S.L. 1984, ch. 102, § 1, effective July 1, 1984. Cited in: State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981).

**47-1314. Disturbed lands to be restored — Notice and restoration of placer or dredge exploration operations.** — (a) Any person conducting a placer or dredge mining operation shall, within one (1) year of permanent cessation of operations as to the whole or any part of the permit area, commence restoration of disturbed lands in the permit area or in any portion thereof as to which operations are permanently ceased. In accordance with a permit approved for the operation under section 47-1317, Idaho Code, surfaces shall be returned to a contour reasonably comparable to that contour existing prior to disturbance, topsoil shall be replaced where deemed appropriate by the board, and vegetation shall be planted reason-

ably comparable to that vegetation existing prior to disturbance. Any disturbed natural watercourse shall be restored to a configuration and pool structure conducive to good fish and wildlife habitat and recreational use.

(b) Any person desiring to conduct placer or dredge exploration operations using motorized earth-moving equipment shall, within seven (7) days of commencing exploration, notify the director by certified mail of the name and address of the person, and the location, anticipated size, and method of exploration. Such notice shall be subject to disclosure according to chapter 3, title 9, Idaho Code. Any placer or dredge exploration operation which causes a cumulative surface disturbance in excess of one-half ( $\frac{1}{2}$ ) acre of land, including roads, shall be considered a placer or dredge mining operation. Lands disturbed by any placer or dredge exploration operation which causes a cumulative surface disturbance of less than one-half ( $\frac{1}{2}$ ) acre of land, including roads, shall be restored to conditions reasonably comparable to conditions existing prior to the placer or dredge exploration operation. [I.C., § 47-1314, as added by 1984, ch. 102, § 3, p. 232; am. 1990, ch. 213, § 64, p. 480.]

**Compiler's notes.** Former § 47-1314, which comprised 1955, Init. Meas., § 3; am. 1969, ch. 281, § 3, p. 845, was repealed by S.L. 1984, ch. 102, § 1, effective July 1, 1984.

Sections 63 and 65 of S.L. 1990, ch. 213 are compiled as §§ 47-319 and 47-1506, respectively.

Section 111 of S.L. 1990, ch. 213 as

amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**Sec. to sec. ref.** This section is referred to in §§ 47-1317 and 47-1324.

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Constitutionality.

Federal mining claims.

Time of restoration.

Topsoil replacement.

##### Constitutionality.

The land restoration requirement of former section was reasonably related to the legitimate police power purposes of the dredge mining act and thus did not constitute a taking of private property without just compensation. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976); *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

##### Federal Mining Claims.

The requirement in former section that the operator of a dredge or placer mine restore the land did not conflict with rights granted by federal legislation to miners who conducted a dredge mining operation upon unpatented federal public domain land. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d

969 (1976); *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

##### Time of Restoration.

The last sentence of former section, when construed in favor of the reasonable operation of the statute, did not act to halt restoration until after mining operations have been concluded since the purpose of the Dredge and Placer Mining Act, as set forth in § 47-1312, would be emasculated if that interpretation were adopted. *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

##### Topsoil Replacement.

The requirement that topsoil be replaced after the conclusion of the dredging operation is an exception to the general rule in § 47-1321 (repealed) which allows the director of department of lands to grant a reasonable period of time to meet land restoration requirements. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).



**47-1315. Water clarification.** — Where any person conducts a placer or dredge mining operation where the water used in such mining process flows in, or into a natural watercourse, such person shall construct and use settling ponds of sufficient capacity and character and/or install and use filtration processes fully adequate to clarify the water used in the mining process to conform to the standards and rules of the state department of environmental quality regarding water quality as authorized under chapter 1, title 39, Idaho Code, before such water is discharged into the natural watercourse. [1955, Init. Meas., § 4; am. 1969, ch. 281, § 4, p. 845; am. 1984, ch. 102, § 4, p. 232; am. 2001, ch. 103, § 87, p. 253.]

**Compiler's notes.** Section 5 of S.L. 1984, ch. 102 is compiled as § 47-1317.

Sections 86 and 88 of S.L. 2001, ch. 103 are compiled as §§ 46-1019 and 47-1513, respectively.

**Sec. to sec. ref.** This section is referred to in § 47-1324.

**47-1316. Administrative agency.** — The Idaho state board of land commissioners is hereby designated the administrative agency of this act and shall have the power and duty to adopt rules and regulations for its administration in accordance with the intent and purposes thereof, and to employ personnel necessary to effectually carry out this law. Such board may make such inquiries and investigations and conduct such hearings as the board shall deem advisable or necessary. [1955, Init. Meas., § 5; am. 1969, ch. 281, § 5, p. 845.]

**Compiler's notes.** The words "this act" refer to S.L. 1955, Init. Meas., which is compiled throughout this chapter.

**Adoption of Rules.**

Although this section did not provide for a hearing upon the imposition or change of

rules and regulations, permittees were not denied procedural due process since the adoption of rules and regulations would be covered by procedures set forth in administrative procedures act. State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

**47-1317. Application, permit and bond required.** — (a) Before any person may conduct a placer or dredge mining operation on lands or natural watercourses in the state of Idaho, such person shall file with the director an application for a permit upon a form provided by the director, and shall pay an application fee of fifty dollars (\$50.00), for each ten (10) acres or fraction thereof above involved in such application, provided that no application fee shall exceed one thousand dollars (\$1,000). Application fees shall be deposited in the dredge and placer mining account.

(b) The permit to issue in any such case shall be in a form provided and approved by the board. No such permit shall be issued to any applicant until the applicant files with the director an initial bond in an amount necessary to pay the estimated reasonable costs of reclamation required under the permit for each acre of land to be disturbed during the first season of operation plus ten percent (10%). The amount of the bond shall not exceed one thousand eight hundred dollars (\$1,800) per acre of disturbed land. At the beginning of each calendar year or before operations begin, the operator shall notify the director of any increase or decrease in the acreage of disturbed lands which will result from planned placer mining activity

within the next operating season. A correlated increase or decrease in the bond shall be required by the director for a change in disturbed acreage. In the event of failure by the permittee to reclaim disturbed lands in the permit area, the cost charged to the permittee shall be reasonable costs of reclamation plus ten percent (10%); provided that in no event shall any bond submitted pursuant to this section exceed one thousand eight hundred dollars (\$1,800) for any given acre of disturbed land. The determination by the board of reclamation costs shall constitute a final decision subject to judicial review as set forth in subsection (d)[(c)] of section 47-1320, Idaho Code. The bond may be submitted in the form of a surety, cash, certificate of deposit, or other bond acceptable to the director, provided that any bond shall be in the applicable amount set forth above.

(c) It shall be unlawful for any person to conduct placer or dredge mining operations in this state without first having obtained a permit and bond as herein provided. The board shall determine whether a permit application and bond submitted by an applicant satisfies the requirements of this act and regulations promulgated thereto. Upon such determination, the board shall notify the applicant in writing of approval or denial of the permit application and bond. Any notice of rejection shall state the reasons for such rejection. An applicant may submit an amended permit application and bond.

(d) It shall be the duty of the board in its administration of this act to cause periodic inspections to be made of the operations under such permits to determine compliance with this law and to make rules and regulations with respect thereto and the cost and expense of making such inspections shall be borne by the permittee, which such costs and expenses shall constitute a lien upon equipment, personal property, or real property of the permittee and upon minerals produced from the permit area, and the failure to pay the amount thereof on demand by the board shall be cause for termination of the permit. All inspection fees shall be deposited in the dredge and placer mining account.

(e) The board may release an applicant from the requirement that the applicant submit a bond if the director determines that the applicant has insured faithful performance of the requirements of this act and regulations promulgated thereto pertinent to land and watercourse restoration by submitting and having on file a current and valid bond with the United States government, which bond equals or exceeds the amount set forth above, provided that such release by the director shall not release an applicant from bonding under this act, should the permittee fail to continuously maintain a valid bond with the United States government or from compliance with any other requirement of this act or regulations promulgated thereto.

(f) Upon determination by the director that restoration has been satisfactorily completed on a portion of a permit area in accordance with the applicable approved permit and with subsection (a) of section 47-1314, Idaho Code, the board may reduce the bond amount to reflect the completed restoration.

(g) That if any applicant for such dredge or other placer mining operations as contemplated by this act be not the owner of the lands described in



the application or any part thereof, the owner of such lands shall indorse his approval of the application, and no permit shall be issued in the absence of such approval by the owner of lands described in the application not owned by the applicant.

(h) No permit shall be issued proposing to alter or occupy the bed of a navigable stream or to dredge any stream or watercourse without notification to the department of water resources of the pending application. The department of water resources shall respond to said notification within twenty (20) days, and the response shall be included in any permit granted hereunder by a showing whether the permit constitutes a permit from the department of water resources or whether an additional permit from the department of water resources shall be required.

(i) No permit shall issue hereunder to dredge nor otherwise placer mine any lands owned by the state of Idaho, including the beds of navigable streams, and including the mineral reservations in lands sold by the state, unless a mineral lease shall be made of such terms and at such royalty to the state as its board of state land commissioners shall prescribe and determine.

(j) The Idaho state board of land commissioners shall have the power to deny any application for a permit on state land, stream or river beds, or on any unpatented mining claims, upon its determination that a dredge mining operation on the land proposed would not be in the public interest, giving consideration to economic factors, recreational use for such lands, fish and wildlife habitat and other factors which in the judgment of the state land board may be pertinent, and may deny an application upon notification by the department of water resources that the grant of such permit would result in permanent damage to a stream channel.

(k) Upon default, in the event that the amount of the bond is insufficient to reclaim the land in compliance with the act and the approved plan, the attorney general is empowered to commence legal action against the operator in the name of the board to recover the amount in excess of the bond necessary to reclaim the land in compliance with the act and the approved plan. [1955, Init. Meas., § 6; am. 1957, ch. 325, § 1, p. 685; am. 1969, ch. 281, § 6, p. 845; am. 1974, ch. 17, § 34, p. 308; am. 1976, ch. 150, § 4, p. 539; am. 1980, ch. 278, § 1, p. 722; am. 1984, ch. 102, § 5, p. 232; am. 1993, ch. 308, § 1, p. 1137.]

**Compiler's notes.** The bracketed reference near the end of subsection (b) was inserted by the compiler.

For words "this act" see compiler's note, § 47-1316.

Section 2 of S.L. 1957, ch. 325, is compiled herein as § 47-1319.

Sections 33 and 35 of S.L. 1974, ch. 17, are compiled as §§ 47-324 and 47-1503.

Section 3 of S.L. 1976, ch. 150, is compiled herein as § 42-3805.

Sections 4 and 6 of S.L. 1984, ch. 102 are compiled as §§ 47-1315 and 47-1319.

Section 75 of S.L. 1974, ch. 17 provided that the act should take effect on and after July 1, 1974.

Section 9 of S.L. 1984, ch. 102 read: "This act shall be in full force and effect on and after July 1, 1984, provided that any person conducting a placer or dredge mining operation under a valid state permit and bond as of July 1, 1984, shall not be required to obtain an amended permit or bond conforming to this act prior to July 1, 1985."

Section 2 of S.L. 1993, ch. 308 declared an emergency. Approved March 31, 1993.

**Sec. to sec. ref.** This section is referred to in § 47-1314.

#### ANALYSIS

Constitutionality.

Denial of application.  
Federal mining claims.  
Lien on machinery.  
Lien on minerals.  
U.S. as landowner.

#### **Constitutionality.**

The permit and bonding requirements of this section are reasonably related to the legitimate police power purposes of the dredge mining act and thus do not constitute a taking of private property without just compensation. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

#### **Denial of Application.**

The power to deny applications for permits granted to the board of land commissioners in subsection (i) of this section does not constitute an unconstitutional delegation of legislative power in view of procedure for review of board decisions provided for in § 47-1320. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

#### **Federal Mining Claims.**

The requirement in this section that the operator of a dredge or placer mine obtain a state permit did not conflict with rights granted by federal legislation to miners who conducted a dredge mining operation upon unpatented federal public domain land. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

#### **Lien on Machinery.**

A district court's imposition of a "lien" upon a mining partnership's machinery and claims in order to secure the costs of preparing a land

restoration plan and contingent restoration costs was an action which, in effect, replaced the security ordinarily assured by the statutory bond required by this section and was within the inherent power of the court under § 1-1603 to insure compliance not only with the intent of the statute but also with its own related orders. *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied, 457 U.S. 1116, 102 S. Ct. 2927, 73 L. Ed. 2d 1328 (1982).

#### **Lien on Minerals.**

Although the lien for inspection costs provided for in subsection (d) of this section could not attach to unpatented federal public domain land, the lien could attach to the minerals produced therefrom. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

Procedural due process does not require notice or hearing prior to imposition of lien on minerals under subsection (d) of this section; although a judgment foreclosing the lien for inspection costs could not be rendered against operator of dredge mine without notice and an opportunity to be heard. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

#### **U.S. as Landowner.**

Where mining partnership conducted dredge mining operation upon unpatented federal public domain land under valid federal mining claims, the federal government was not subject to requirement that the landowner endorse its approval on mining partnership's application for state permit. *State ex rel. Andrus v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

**47-1318. Termination of permits — Hearing.** — Without in any manner affecting the penal and injunctive provisions of this act the Idaho state board of land commissioners is empowered to commence proceedings to terminate any permit to conduct dredge or other placer mining operations issued hereunder for any violation of the terms of this act, after having issued and served upon the permittee alleged to be committing such violation, a formal complaint which shall specify the provisions of this act which the permittee allegedly is violating, and a statement of the manner in and the extent to which said permittee is alleged to be violating the provisions of this act. Such notice may be served by certified mail, and return receipt signed by the permittee or his agent shall constitute service and time thereof of such notice. The permittee shall answer the complaint and request a hearing before a designated hearing officer within thirty (30) days from receipt of the complaint if matters asserted in the complaint are disputed. If the permittee fails to answer the complaint and to request a hearing, the matters asserted in the complaint shall be deemed admitted by the permittee, and the board may proceed to terminate the permit and forfeit the bond in an amount necessary to pay all costs and expense of



restoring the lands and beds of streams damaged by dredge or other placer mining of the defaulting permittee. Upon request for a hearing by a permittee, the board shall schedule a hearing not less than thirty (30) days after the date the permittee requests a hearing. The provisions of chapter 52, title 67, Idaho Code, shall govern proceedings instituted pursuant to this section. The board may designate one (1) of its members, or a hearing officer or officers to conduct any hearings and enter recommended or preliminary orders, as determined by the board, on issues involving the administration of this act.

Upon entry of a final order terminating a permit or forfeiting a bond, the board shall assess the costs of the hearing against the defaulting permittee. [1955, Init. Meas., § 7; am. 1969, ch. 281, § 7, p. 845; am. 1986, ch. 82, § 1, p. 242; am. 1988, ch. 72, § 1, p. 102; am. 1993, ch. 216, § 44, p. 587.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-1316.

Sections 43 and 45 of S.L. 1993, ch. 216 are compiled as §§ 47-718 and 47-1320, respectively.

**Sec. to sec. ref.** This section is referred to in § 47-1324.

**Cited in:** State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

**47-1319. Bond forfeiture on default.** — (a) The surety bond required by this act to be given by a permittee for dredge or other placer mining purposes under permit shall be exonerated and discharged upon the completion or termination of such mining operation as specified in the permit granted therefor and upon full compliance with the requirements of this act and the rules and regulations of said board of land commissioners made for the administration thereof.

(b) That in event the holder of any permit issued under this act fails to comply with the requirements of this act and the rules and regulations of the Idaho board of land commissioners for the administration hereof, then the applicable bond of such permittee shall be forfeited to the state of Idaho in such amount and to such extent as the state board of land commissioners shall estimate and determine will be necessary to pay all cost and expense of restoring the lands and beds of streams damaged by dredge or other placer mining of said defaulting permittee and covered by such bond and remaining unrestored, and such forfeited funds are to be deposited in the dredge and placer mining account, which is hereby created in the dedicated fund of the state treasury. All moneys deposited in the dredge and placer mining account pursuant to this section or other provisions of this chapter shall be utilized by the state board of land commissioners for the restoration of lands and watercourses damaged by placer or dredge mining operations.

(c) No forfeiture of bond of a permittee shall be made until after procedures have been followed as provided in sections 47-1318 and 47-1320, Idaho Code, and the complaint is issued and findings of facts and rulings of law in support of the order of forfeiture, if any, have been made and the time for appeal has expired. [1955, Init. Meas., § 8; am. 1957, ch. 325, § 2, p. 685; am. 1969, ch. 281, § 8, p. 845; am. 1984, ch. 102, § 6, p. 232; am. 1988, ch. 72, § 2, p. 102.]

**Compiler's notes.** For words "this act" see compiler's note, § 47-1316.

Section 1 of S.L. 1957, ch. 325 is compiled as § 47-1317, § 3 has been repealed and § 4 is an emergency clause.

Section 5 of S.L. 1984, ch. 102 is compiled as § 47-1317.

Section 3 of S.L. 1988, ch. 72 is compiled as § 47-1324.

**Sec. to sec. ref.** This section is referred to in § 47-1324.

**Cited in:** State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

**47-1320. Hearing procedures and appeals.** — (a) Process and procedure under this act shall be as summary and simple as reasonably may be and as far as possible in accordance with the rules of equity. Such proceedings shall be governed by the provisions of chapter 52, title 67, Idaho Code. The board, or any member thereof, or the hearing officer designated by such board, shall have power to subpoena witnesses and administer oaths. The district court shall have power to enforce by proper proceedings the attendance and testimony of witnesses, and the production for examination of books, papers and records. Witnesses subpoenaed by the board or a member thereof or the hearing officer shall be allowed such fees and traveling expenses as are allowed in civil actions in the district court, to be paid by the party in whose interest such witnesses are subpoenaed. The board, or any member thereof, or the hearing officer, shall make such inquiries and investigations as shall be deemed relevant. Each hearing shall be held at the county seat in any county where the dredge or other placer mining is being conducted or where any of the lands involved in the hearing are situate, or in the county of Ada, as the board may designate.

(b) If the hearing involves a permit or application for a permit, the final order of the board, together with the agency record, as provided in chapter 52, title 67, Idaho Code, shall be filed in the office of the director of the department of lands. A copy of the order shall be sent to the applicant or holder of the permit involved in such hearing by United States mail.

(c) Any applicant or permit holder aggrieved by any final decision or order of the board shall be entitled to judicial review in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code. [I.C., § 47-1320, as added by 1969, ch. 281, § 9, p. 845; am. 1984, ch. 102, § 7, p. 232; am. 1993, ch. 216, § 45, p. 587.]

**Compiler's notes.** A prior provision from § 9 of S.L. 1955, Init. Meas., formerly compiled as § 47-1320, that provided for direct appeals to the Supreme Court, was held unconstitutional in State v. Finch (1957), 79 Idaho 275, 315 P.2d 529.

Section 8 of S.L. 1984, ch. 102 is compiled as § 47-1324.

Sections 44 and 46 of S.L. 1993, ch. 216 are compiled as §§ 47-1318 and 47-1505, respectively.

**Sec. to sec. ref.** This section is referred to in § 47-1317.

**Cited in:** State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Appeals.  
Constitutionality.  
Due process.  
Separability.

##### Appeals.

Although the case was before the Supreme Court on appeal where it had been concluded that no right of appeal existed from the board of land commissioners under the Idaho dredge mining protection act to the Supreme



Court, nevertheless for a proper and orderly disposition of the problem presented, the case would be considered as being before the court on certiorari. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

Where there was no valid provision for appeal from the order of the board of land commissioners in the Idaho dredge mining protection act and there was no other protection for the property right of the appellant, and the character of the duties and orders of the board of land commissioners and its duly designated hearing agent being judicial in nature, appellant under the act was without remedy to protect his constitutional rights and the order which revoked the dredge mining permit was null and void. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

#### **Constitutionality.**

That provision of the Idaho dredge mining protection act which provided for an appeal from the board of land commissioners directly

to the Supreme Court was unconstitutional and void as being an attempt to evade judicial processes by legislation. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

#### **Due Process.**

Where that part of the Idaho dredge mining protection act providing for an appeal to the Supreme Court was held unconstitutional, it left the act without provision for due process. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

#### **Separability.**

Because the provision of the dredge mining protection act which provided for an appeal directly to the Supreme Court does not in itself appear to be an integral or indispensable part of the act, it may be stricken therefrom without affecting the balance of the act. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

### **47-1321. Penalties and administrative remedies. [Repealed.]**

**Compiler's notes.** This section, which comprised 1955, Init. Meas., § 10; am. 1957, ch. 325, § 3, p. 685; am. 1969, ch. 281, § 10, p.

845, was repealed by S.L. 1984, ch. 102, § 1, effective July 1, 1984.

**47-1322. Title.** — This act may be cited as the "Idaho Dredge and Placer Mining Protection Act." [1955, Init. Meas., § 13; am. 1969, ch. 281, § 11, p. 845.]

**Compiler's notes.** For words "this act" see Compiler's note, § 47-1316.

**47-1323. Dredge mining of water bodies making up the national wild and scenic rivers system prohibited.** — Dredge mining in any form shall be prohibited on:

(1) The middle fork of the Clearwater river, from the town of Kooskia upstream to the town of Lowell; the Lochsa river from its junction with the Selway at Lowell forming the middle fork, upstream to the Powell ranger station; and the Selway river from Lowell upstream to its origin;

(2) The middle fork of the Salmon river, from its origin to its confluence with the main Salmon river;

(3) The St. Joe river, including tributaries, from its origin to its confluence with Coeur d'Alene lake, except for the St. Maries river and its tributaries. [I.C., § 47-1323, as added by 1970, ch. 244, § 1, p. 659; am. 1977, ch. 114, § 1, p. 246.]

**Cited in:** *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981).

**47-1324. Enforcement and penalties for violation.** — (a) The board may maintain an action in the name of the state of Idaho to enjoin any

person from operating or maintaining a placer or dredge mining operation without holding a valid permit or bond as provided in this act or regulations promulgated thereto. The court, or a judge thereof at chambers, if satisfied from a complaint or by affidavits that the alleged acts have been or are being committed, may issue a temporary restraining order, without notice or bond, enjoining the defendant, his agents and employees, from operating or maintaining such placer or dredge mining operation without obtaining a permit and bond as provided in this act or regulations promulgated thereto. No showing of injury shall be required other than that this act is being violated by the operation or maintenance of a placer or dredge mining operation without the approved permit and bond. Upon a showing of good cause therefor, the court may require the defendant to undertake mitigation or restoration of the disturbed area in conformity with section 47-1314, Idaho Code, pending final disposition of the action. The action shall proceed as in other cases for injunctions. If at the trial the operation and maintenance of a placer or dredge mining operation without a permit or bond be established, and the court further finds that it is probable that the defendant will continue therein or in similar violations, the court shall enter a decree perpetually enjoining said defendant, his agents and employees from thereafter committing said or similar actions in violation of this act.

(b) The board may maintain an action in the name of the state of Idaho to enjoin any person from operating or maintaining a placer or dredge mining operation when, under an existing approved permit and bond, a permittee violates or exceeds the terms of the permit or violates a provision of this act, and the bond, if forfeited, would not be sufficient to adequately restore the land.

(c) In addition to the injunctive provisions above, the board may maintain a civil action against any person who violates any provision of this act to collect civil damages in an amount sufficient to pay for all the damages to the state caused by such violation, including but not limited to, costs of restoration in accordance with section 47-1314, Idaho Code, where a person is conducting placer or dredge mining without an approved permit or bond.

(d) Notwithstanding any other provisions of this act, any person who violates any of the provisions of this act or regulations promulgated thereto, or who violates any determination or order promulgated pursuant to the provisions of this act, shall be liable for a civil penalty of not less than five hundred dollars (\$500) nor more than two thousand five hundred dollars (\$2,500) for each day during which such violation continues. Such penalty shall be recoverable in an action brought in the name of the state of Idaho by the attorney general. All sums recovered shall be placed in the state treasury and credited to the dredge and placer mining account, to be administered by the board for the restoration of lands and watercourses damaged by placer or dredge mining operations.

(e) No administrative action or decision by the director or board shall be required prior to enforcement of any of the above remedies, provided that no permit shall be terminated and no bond shall be forfeited without administrative action as provided under sections 47-1318 and 47-1319, Idaho Code. No administrative action or decision by the Idaho board of health and



welfare shall be required prior to enforcement of any of the above remedies by the state of Idaho against any person violating section 47-1315, Idaho Code.

(f) Any person who wilfully or knowingly falsifies any records, plans, specifications, or other information required by the board or wilfully fails, neglects, or refuses to comply with any provisions of this act shall be guilty of a misdemeanor punishable by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000) or imprisonment not to exceed one (1) year, or both.

(g) All civil actions provided for in this section shall be filed in the district court of this state for the county wherein the violation, or some part thereof, occurs, or in the district court for the county wherein the defendant resides or has a principal place of business, or in the district court for the county of Ada if the defendant resides out-of-state, or in the appropriate court of the United States where the rules and statutes governing such courts permit. [I.C., § 47-1324, as added by 1971, ch. 208, § 1, p. 917; am. 1984, ch. 102, § 8, p. 232; am. 1988, ch. 72, § 3, p. 102.]

**Compiler's notes.** Section 7 of S.L. 1984, ch. 102 is compiled as § 47-1320.

Section 2 of S.L. 1988, ch. 72 is compiled as § 47-1319.

Section 9 of S.L. 1984, ch. 102 read: "This act shall be in full force and effect on and after July 1, 1984, provided that any person conducting a placer or dredge mining operation

under a valid state permit and bond as of July 1, 1984, shall not be required to obtain an amended permit or bond conforming to this act prior to July 1, 1985."

Cited in: State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976); State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614 (1981).

## CHAPTER 14

### MINERAL LEASES BY POLITICAL SUBDIVISIONS AND MUNICIPALITIES

#### SECTION.

47-1401. Lease for exploration and development authorized.

47-1402. Cooperative or unit development.

#### SECTION.

47-1403. Rules for issuing lease — Term — Royalty.

**47-1401. Lease for exploration and development authorized. —** The governing body of any county, city, town, village, school district or other municipal corporation or political subdivision of the state of Idaho authorized to acquire and hold real property may, upon determining that such action will be in the best interest of such county, city, town, village, school district or other municipal corporation or political subdivision of the state of Idaho, lease, or enter into a community lease with respect to, any mineral interest owned by such county, city, town, village, school district or other municipal corporation or political subdivision of the state of Idaho, for the exploration for and development and production of oil, gas or other hydrocarbons, and otherwise contract for such exploration, development and production, upon such terms as such governing body may determine and as are not inconsistent with the provisions of this act. [1961, ch. 100, § 1, p. 149.]

**Compiler's notes.** The words "this act" refer to S.L. 1961, ch. 100, compiled as §§ 47-1401 — 47-1403.

**Collateral References.** 54 Am. Jur. 2d, Mines and Minerals, §§ 23, 24.

**47-1402. Cooperative or unit development.** — Any such governing body may, by such lease or contract, or by other agreement, include, or provide for the inclusion of, any such interest with other interests in any plan or agreement for cooperative or unit development or operation for oil, gas or other hydrocarbons, and modify and change any and all terms of any such lease or contract heretofore entered into or hereafter entered into under the provisions of this act, including the extension of the terms of any such lease or contract for the full period of time such cooperative or unit plan or agreement may remain in effect, as required to conform the terms of any such lease or contract to such cooperative or unit plan or agreement. [1961, ch. 100, § 2, p. 149.]

**Compiler's notes.** For words "this act" see note to § 47-1401.

**47-1403. Rules for issuing lease — Term — Royalty.** — Any such governing body may, in its discretion, make and establish such rules and regulations governing the issuance of such leases and contracts as are not inconsistent with provisions of this act. Any such lease or contract (1) shall be entered into pursuant to resolution duly adopted by the governing body, (2) may be for a term not exceeding ten (10) years and as long thereafter as oil, gas or other hydrocarbons shall be, or can be, produced in commercial quantities, except as such term may be extended pursuant to the provisions of section 47-1402, and (3) shall reserve to the governing body a royalty of not less than one-eighth ( $\frac{1}{8}$ ) of all oil, gas or other hydrocarbons produced from said lands. [1961, ch. 100, § 3, p. 149.]

**Compiler's notes.** For words "this act" see note to § 47-1401.

## CHAPTER 15

### SURFACE MINING

#### SECTION.

- 47-1501. Purpose of chapter.
- 47-1502. Short title.
- 47-1503. Definitions.
- 47-1504. Board of land commissioners — Responsibility.
- 47-1505. Duties and powers of board.
- 47-1506. Operator — Duties prior to operation — Submission of maps and plans.
- 47-1507. Reclamation plan — Approval or rejection by board — Hearing.
- 47-1508. Amended reclamation plan — Supplemental plan — Submission.
- 47-1509. Procedures in reclamation.
- 47-1510. Vegetation planting.

#### SECTION.

- 47-1511. Reclamation activities — Time limitations.
- 47-1512. Performance bond — Requisites.
- 47-1513. Operator's failure to comply — Forfeiture of bond — Penalties — Reclamation fund.
- 47-1514. Appeal from final order — Procedure.
- 47-1515. Information.
- 47-1516. Deposit of forfeitures and damages.
- 47-1517. Conduct of explorations.
- 47-1518. Effective date — Application of act.
- 47-1519. Application of chapter to mineral extraction for public highway purposes.



**47-1501. Purpose of chapter.** — It is the purpose of this act to provide for the protection of the public health, safety and welfare, through measures to reclaim the surface of all the lands within the state disturbed by exploration and surface mining operations and thereby conserve natural resources, aid in the protection of wildlife, domestic animals, aquatic resources, and reduce soil erosion. [1971, ch. 206, § 1, p. 898; am. 1973, ch. 180, § 1, p. 415.]

**Compiler's notes.** The words "this act" refer to S.L. 1971, ch. 206 compiled as §§ 47-1501 — 47-1518.

**Sec. to sec. ref.** This chapter is referred to in § 38-1312.

**Cited in:** State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

#### **Trespassers on Mining Lands.**

Since the Idaho Surface Mining Act (§§ 47-1501 — 47-1518) provides no affirmative duty to protect trespassers on mining lands, and it applies only after abandonment of the mine,

the act created no duty of care in favor of the plaintiff, a trespasser, who was injured when he fell over the edge of a sandpit. *Cooper v. Unimin Corp.*, 639 F. Supp. 1208 (D. Idaho 1986).

**Collateral References.** 54 Am. Jur. 2d, Mines and Minerals, §§ 340-348.

58 C.J.S., Mines and Minerals, § 240.

Validity of statute restricting the right of mining so as not to interfere with surface. 28 A.L.R. 1330.

**47-1502. Short title.** — This act may be known and cited as "the Idaho surface mining act." This act shall not apply to surface mining operations regulated by the Idaho Dredge and Placer Mining Protection Act. [1971, ch. 206, § 2, p. 898.]

**Compiler's notes.** For the words "this act" see Compiler's note, § 47-1501.

The Idaho Dredge and Placer Mining Pro-

tection Act is compiled as §§ 47-1312 — 47-1324.

**47-1503. Definitions.** — Wherever used or referred to in this act, unless a different meaning clearly appears from the context:

1. "Board" means the state board of land commissioners or such department, commission, or agency as may lawfully succeed to the powers and duties of such board.

2. "Director" means the head of the department of lands or such officer as may lawfully succeed to the powers and duties of said director.

3. "Affected land" means the land area included in overburden disposal areas, mined areas, mineral stockpiles, roads, tailings ponds and other areas disturbed at the surface mining operation site.

4. "Mineral" shall mean coal, clay, stone, sand, gravel, metalliferous and nonmetalliferous type of ores, and any other similar solid material or substance of commercial value to be excavated from natural deposits on or in the earth.

5. "Surface mining operations" means the activities performed on a surface mine in the extraction of minerals from the ground, including the excavating of pits, removal of minerals, disposal of overburden, and the construction of haulage roads, exclusive of exploration operations, except that any exploration operations which, exclusive of exploration roads, (1) result during a period of twelve (12) consecutive months in more than five (5) contiguous acres of newly affected land, or (2) which, exclusive of exploration roads, result during a period of twelve (12) consecutive months

in newly affected land consisting of more than ten (10) noncontiguous acres, if such affected land constitutes more than fifteen per cent (15%) of the total area of any circular tract which includes such affected land, shall be deemed to be a surface mining operation for the purposes of this act.

6. "Exploration operations" means activities performed on the surface of lands to locate mineral bodies and to determine the mineability and merchantability thereof.

7. "Surface mine" means an area where minerals are extracted by removing the overburden lying above and adjacent to natural deposits thereof and mining directly from the natural deposits thereby exposed.

8. "Mined area" means surface of land from which overburden or minerals have been removed other than by drilling of exploration drill holes.

9. "Overburden" means material extracted by an operator which is not a part of the material ultimately removed from a surface mine and marketed by an operator, exclusive of mineral stockpiles.

10. "Overburden disposal area" means land surface upon which overburden is piled or planned to be piled.

11. "Exploration drill holes" means holes drilled from the surface to locate mineral bodies and to determine the mineability and merchantability thereof.

12. "Exploration roads" means roads constructed to locate mineral bodies and to determine the mineability and merchantability thereof.

13. "Exploration trenches" means trenches constructed to locate mineral bodies and to determine the mineability and merchantability thereof.

14. "Peak" means a projecting point of overburden.

15. "Mine panel" means that portion of a mine designated by an operator as a panel of a surface mine on the map submitted pursuant to section 47-1506, Idaho Code.

16. "Mineral stockpile" means minerals extracted during surface mining operations and retained at the surface mine for future rather than immediate use.

17. "Pit" means an excavation created by the extraction of minerals or overburden during surface mining operations.

18. "Ridge" means a lengthened elevation of overburden.

19. "Road" means a way constructed on a surface mine for the passage of vehicles, including the bed, slopes and shoulders thereof.

20. "Operator" means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, either natural or artificial, including but not limited to every public or governmental agency engaged in surface mining or exploration operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors and shall mean every governmental agency owning or controlling the use of any surface mine when the mineral extracted is to be used by or for the benefit of such agency. It shall not include any such governmental agency with respect to those surface mining or exploration operations as to which it grants mineral leases or prospecting permits or similar contracts, but nothing herein shall relieve the operator acting pursuant to a mineral lease, prospecting permit or similar contract from the terms of this act.



21. "Hearing officer" means that person selected by the board to hear proceedings under section 47-1513, Idaho Code.

22. "Final order of the board" means a written notice of rejection, the order of a hearing officer at the conclusion of a hearing, or any other order of the board where additional administrative remedies are not available.

23. "Tailings pond" means an area on a surface mine inclosed by a man-made or natural dam onto which has been discharged the waste material resulting from the primary concentration of minerals in ore excavated from a surface mine. [1971, ch. 206, § 3, p. 898; am. 1973, ch. 180, § 2, p. 415; am. 1974, ch. 17, § 35, p. 308.]

**Compiler's notes.** For the words "this act" see Compiler's note, § 47-1501.

Section 34 of S.L. 1974, ch. 17 is compiled as § 47-1317.

reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract. 53 A.L.R.3d 16.

**Collateral References.** What constitutes

**47-1504. Board of land commissioners — Responsibility.** — The state board of land commissioners is charged with the responsibility of administering this act in accordance with the purpose of the act and the intent of the legislature. The director of the department of lands shall, upon authorization of the board, exercise the powers and discharge the duties vested in the board by this act. [1971, ch. 206, § 4, p. 898; am. 1974, ch. 17, § 36, p. 308.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Section 37 of S.L. 1974, ch. 17 is compiled as § 47-1513.

**47-1505. Duties and powers of board.** — In addition to the other duties and powers of the board prescribed by law, the board is granted and shall be entitled to exercise the following authority and powers and perform the following duties:

(1) To administer and enforce the provisions of this act and the rules and orders promulgated thereunder as provided in this act.

(2) To conduct and promote the coordination and acceleration of research, studies, surveys, experiments, demonstrations and training in carrying out the provisions of this act. In carrying out the activities authorized by this section, the board may enter into contracts with and make grants to institutions, agencies, organizations and individuals, and shall collect and make available any information obtained therefrom.

(3) To adopt and promulgate reasonable rules respecting the administration of this act and such rules as may be necessary to carry out the intent and purposes of this act, provided that no rules shall be adopted which require reclamation activities in addition to those set forth in this act. All such rules shall be adopted in accordance with and subject to the provisions of chapter 52, title 67, Idaho Code.

(4) To enter upon affected lands at all reasonable times, for the purpose of inspection, to determine whether the provisions of this act have been complied with. Such inspections shall be conducted in the presence of the

operator or his duly authorized employees or representatives, and the operator shall make such persons available for the purpose of inspections.

(5) To reclaim affected land with respect to which a bond has been forfeited, and, in the board's discretion, with the permission of the landowner, to reclaim such other land which becomes affected land.

(6)(a) Upon receipt of a proposed reclamation plan or amended or supplemental reclamation plan, the director shall notify the cities and counties in which the surface mining operation is proposed. The notice shall include the name and address of the operator and shall describe the procedure and the schedule by which the plan may be approved or denied. This notification requirement shall not apply to exploration operations.

(b) Cities and counties may review the nonconfidential portions of the plan at the department's office and may provide comments to the director concerning the plan. Nothing in this section shall extend the time limit for the board to deliver to the operator a notice of rejection or approval of the plan or affect the confidentiality provisions of section 47-1515, Idaho Code.

(c) No city or county shall enact or adopt any ordinance, rule or resolution to regulate exploration or surface mining operations in this state which conflicts with any provision of this chapter or the rules promulgated thereunder. This subpart shall not affect the planning and zoning authorities available to cities and counties pursuant to chapter 65, title 67, Idaho Code. [1971, ch. 206, § 5, p. 898; am. 1988, ch. 223, § 1, p. 424; am. 1993, ch. 216, § 46, p. 587; am. 1995, ch. 364, § 1, p. 1274.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Section 2 of S.L. 1988, ch. 223 is compiled as § 47-1512.

Sections 45 and 47 of S.L. 1993, ch. 216 are compiled as §§ 47-1320 and 47-1513, respectively.

**47-1506. Operator — Duties prior to operation — Submission of maps and plans.** — (a) Any operator desiring to conduct surface mining operations within the state of Idaho for the purpose of immediate or ultimate sale of the minerals in either the natural or processed state, shall submit to the board prior to commencing such surface mining operations a reclamation plan that contains the following:

(1) A map of the mine panel on which said operator desires to conduct surface mining operations, which sets forth with respect to said panel the following:

(i) The location of existing roads and anticipated access and main haulage roads planned to be constructed in conducting the surface mining operations.

(ii) The approximate boundaries of the lands to be utilized in the process of surface mining operations.

(iii) The approximate location and, if known, the names of all streams, creeks, or bodies of water within the area where surface mining operations shall take place.



- (iv) The name and address of the person to whom notices, orders, and other information required to be given to the operator pursuant to this act may be sent.
  - (v) The drainage adjacent to the area where the surface is being utilized by surface mining operations.
  - (vi) The approximate boundaries of the lands that will become affected lands as a result of surface mining operations during the year immediately following the date that a reclamation plan is approved as to said panel, together with the number of acres included within said boundaries.
  - (vii) A description of foreseeable, site-specific nonpoint sources of water quality impacts upon adjacent surface waters, and the best management practices that will be used to control such nonpoint source impacts.
  - (viii) A description of foreseeable, site-specific impacts from acid rock drainage and the best management practices that will be used to mitigate the impacts, if any, from such acid rock drainage.
- (2) Diagrams showing the planned location of pits, mineral stockpiles, overburden piles and tailings ponds on said panel.
- (3) A description of the action which said operator intends to take to comply with the provisions of this act as to the surface mining operations conducted on such mine panel.
- (b) Any operator who is not required to submit an operating plan for a surface mining operation to an entity of the federal government shall submit to the board, as part of the reclamation plan, an operating plan with regards to that surface mining operation. The operating plan shall include:
- (1) Maps showing the location of existing roads and anticipated access and main haulage roads planned to be constructed for surface mining operations.
  - (2) The boundaries and acreage of the lands to be utilized in the process of surface mining operations.
  - (3) Maps showing the planned location of pits, mineral stockpiles, overburden piles and tailings ponds for the surface mining operations.
  - (4) The location and, if known, the names of all streams, creeks, or bodies of water within the area where surface mining operations shall take place.
  - (5) The drainage adjacent to the area where the surface is being utilized by surface mining operations.
  - (6) The approximate boundaries and acreage of the lands that will become affected during the first year of construction of surface mining operations.
  - (7) The board shall promulgate rules or guidelines to allow the content of a nonfederal operating plan to be determined based upon the type and size of the surface mining operation.
- (c) No operator who is required to submit an operating plan for a surface mining operation to an entity of the federal government shall be required to submit an operating plan to the board. This provision shall apply to all lands, regardless of surface or mineral ownership, covered by the operating plan submitted to the entity of the federal government.

(d) No operator shall commence surface mining operations on any mine panel without first having a reclamation plan approved by the state board of land commissioners.

(e) Any operator desiring to conduct exploration operations within the state of Idaho using motorized earth-moving equipment in order to locate minerals for immediate or ultimate sale in either the natural or the processed state shall notify the board by certified mail as soon after beginning exploration operations as possible and in any event within seven (7) days after beginning exploration operations. The letter shall include the following:

- (1) The name and address of the operator;
- (2) The location of the operation and the starting date and estimated completion date;
- (3) The anticipated size of the operation, and the general method of operation.

The letter shall be subject to disclosure according to chapter 3, title 9, Idaho Code. [1971, ch. 206, § 6, p. 898; am. 1973, ch. 180, § 3, p. 415; am. 1990, ch. 213, § 65, p. 480; am. 1997, ch. 269, § 1, p. 772.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Sections 2 and 4 of S.L. 1973, ch. 180 are compiled as §§ 47-1503, 47-1509.

Sections 64 and 66 of S.L. 1990, ch. 213 are compiled as §§ 47-1314 and 47-1515, respectively.

**Sec. to sec. ref.** This section is referred to in §§ 47-1503, 47-1512, 47-1513 and 47-1519.

**Collateral References.** Grant, reservation, or lease of minerals and mining rights as including, without expressly so providing, the right to remove the minerals. 70 A.L.R.3d 383.

**47-1507. Reclamation plan — Approval or rejection by board — Hearing.** — (a) Upon determination by the board that a reclamation plan or any amended plan submitted by an operator meets the requirements of this act, the board shall deliver to the operator, in writing, a notice of approval of such reclamation plan, and thereafter said plan shall govern and determine the nature and extent of the reclamation obligations of the operator for compliance with this act, with respect to the mine panel for which the plan was submitted.

(b) If the board determines that a reclamation plan or amended plan fails to fulfill the requirements of this act, it shall deliver to the operator, in writing, a notice of rejection of the reclamation plan and shall set forth in said notice of rejection the reasons for such rejection, the factual findings upon which such rejection is based, the manner in which the plan fails to fulfill said requirements, and the requirements necessary to comply with this act. Upon receipt of said notice of rejection, said operator may submit amended plans. Upon further determination by the board that the amended plan still does not fulfill the requirements of said section, it shall deliver to the operator, in writing, a notice of rejection of the amended reclamation plan in the same form as set out above.

(c) Weather permitting, the board shall deliver to the operator within sixty (60) days after the receipt of any reclamation plan or amended reclamation plan, the notice of rejection or notice of approval of said plan, as the case may be, provided, however, that if the board fails to deliver a notice



of approval or notice of rejection within said time period, the plan submitted shall be deemed to comply with this act, and the operator may commence and conduct his surface mining operations on the mine panel covered by such plan as if a notice of approval of said plan had been received from the board; provided, however, that if weather conditions prevent the board from inspecting the mine panel to obtain information needed to approve or reject a submitted plan, it may, in writing to the operator, extend the time not to exceed thirty (30) days after weather conditions permit such inspection.

(d) For the purpose of determining whether a proposed reclamation plan or amended or supplemental reclamation plan complies with the requirements of this act, the board may, in its discretion, call for a public hearing. The hearing shall be held under such rules as promulgated by the board. Any interested person may appear at the hearing and give testimony. At the discretion of the board, the director may conduct the hearing and transmit a summary thereof to the board. Any hearing held shall not extend the period of time limit in which the board must act on a plan submitted. [1971, ch. 206, § 7, p. 898; am. 1997, ch. 269, § 2, p. 772.]

**Collateral References.** Strip or surface mining, statutory or contractual obligations to restore surface after. 1 A.L.R.2d 575.

Duty of oil or gas lessee to restore surface of leased premises upon termination of operation. 62 A.L.R.4th 1153.

**47-1508. Amended reclamation plan — Supplemental plan — Submission.** — (a) In the event that a material change in circumstances arises which the operator, or the board, believes requires a change in an approved reclamation plan, including any amended reclamation plan, then the operator shall submit to the board a supplemental plan setting forth the proposed changes and the board shall likewise set forth its proposed changes and stating the reasons therefor. Upon determination by the board that a supplemental reclamation plan or any amended supplemental plan submitted by the operator meets the requirements of this act, it shall deliver to the operator, in writing, a notice of approval of said supplemental plan, and thereafter said supplemental plan shall govern and determine the nature and extent of the reclamation obligations of the operator for compliance with respect to the mine panel for which the plan was submitted.

(b) If the board determines that a supplemental reclamation plan fails to fulfill the requirements of this act, it shall deliver to the operator, in writing, a notice of rejection of the supplemental reclamation plan and shall set forth in said notice of rejection the manner in which said plan fails to fulfill said requirements and shall stipulate the corrective requirements necessary to comply with said sections. Upon receipt of said notice of rejection, the operator may submit amended supplemental plans. Upon further determination by the board that an amended supplemental plan does not fulfill the requirements of said sections, it shall deliver to the operator, in writing, a notice of rejection of amended supplemental plan, and shall set forth in said notice of rejection the manner in which such amended supplemental plan fails to fulfill said requirements, and shall stipulate the requirements necessary to comply with said sections.

(c) The board shall, weather permitting, deliver to the operator within sixty (60) days after the receipt of any supplemental reclamation plan or amended supplemental reclamation plan, the notice of rejection, setting forth in detail the reasons for such rejection and the factual findings upon which such rejection is based, or notice of approval of said plan as the case may be, provided, however, that if the board fails to deliver a notice of approval or notice of rejection within said time period, the plan submitted shall be deemed to comply with this act and the operator may commence and conduct or continue, as the case may be, his surface mining operations as if a notice of approval of said plan had been received from the board. If weather conditions prevent the board from inspecting the mine panel to obtain information needed to approve or reject a submitted plan, it may, in writing to the operator, extend the time not to exceed thirty (30) days after weather conditions permit such inspection.

(d) If an operator determines that unforeseen events or unexpected conditions require immediate changes in or additions to an approved plan, the operator may continue surface mining operations in accordance with the procedures dictated by the changed conditions, pending submission and approval of a supplemental plan, even though such operations do not comply with the approved plan, provided, however, that nothing herein stated shall be construed to excuse the operator from complying with the reclamation requirements of sections 47-1509 and 47-1510, Idaho Code, of this act. Notice of such unforeseen events or unexpected conditions shall be given to the board within ten (10) days after discovery thereof, and a proposed supplemental plan shall be submitted within thirty (30) days after discovery thereof. [1971, ch. 206, § 8, p. 898; am. 1997, ch. 269, § 3, p. 772.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Section 4 of S.L. 1997, ch. 269 is compiled as § 47-1512.

**47-1509. Procedures in reclamation.** — (a) Except as otherwise provided in this act, every operator who conducts exploration or surface mining operations which disturb two (2) or more acres within the state of Idaho shall perform the following reclamation activities:

- (1) Ridges of overburden shall be leveled in such manner as to have a minimum width of ten (10) feet at the top.
- (2) Peaks of overburden shall be leveled in such a manner as to have a minimum width of fifteen (15) feet at the top.
- (3) Overburden piles shall be reasonably prepared to control erosion.
- (4) Where water run-off from affected lands results in stream or lake siltation in excess of that which normally results from run-off, the operator shall prepare affected lands and adjacent premises under the control of the operator as necessary to meet the requirements authorized under chapter 1, title 39, Idaho Code, or the conditions of the water run-off prior to commencing surface mining or exploration operations, whichever is the lesser standard.
- (5) Roads which are abandoned shall be cross-ditched insofar as necessary to avoid erosion gullies.



(6) Exploration drill holes shall be plugged or otherwise left so as to eliminate hazards to humans or animals.

(7) Abandoned affected lands shall be topped to the extent that such overburden is reasonably available from the pit, with that type of overburden which is conducive to the control of erosion or the growth of the vegetation which the operator elects to plant thereon.

(8) The operator shall conduct revegetation activities on the mined areas, overburden piles, and abandoned roads in accordance with the provisions of this act.

(9) Tailings ponds shall be reasonably prepared in such a condition that they will not constitute a hazard to human or animal life.

(b) The board may request, in writing, that a given road or portion thereof not be cross-ditched or revegetated, and upon such request, the operator shall be excused from performing such activities as to such road or portion thereof.

(c) Every operator who conducts exploration or surface mining operations which disturb less than two (2) acres within the state of Idaho shall, wherever possible, contour the lands so disturbed to approximate the previous contour of the lands.

(d) The operator and board may agree, in writing, to do any act with respect to reclamation above and beyond the requirements herein set forth. [1971, ch. 206, § 9, p. 898; am. 1973, ch. 180, § 4, p. 415.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

**Sec. to sec. ref.** This section is referred to in §§ 47-1512 and 47-1513.

**47-1510. Vegetation planting.** — (a) Except as otherwise provided in this act, an operator shall plant, on affected lands, vegetation species which can be expected to result in vegetation comparable to the vegetation which was growing on the area occupied by the affected lands prior to the exploration and surface mining operations.

(b) No planting shall be required on any affected lands, or portions thereof, where planting would not be practicable or reasonable because the soil is composed of sand, gravel, shale, stone or other material to such an extent as to prohibit plant growth.

(c) No planting shall be required to be made with respect to any of the following:

(1) On any mined area or overburden pile proposed to be used in the mining operations for haulage roads, so long as such roads are not abandoned.

(2) On any mined area or overburden pile where lakes are formed by rainfall or drainage run-off from the adjoining lands.

(3) On any mineral stockpile.

(4) On any exploration trench which will become a part of any pit or overburden disposal area.

(5) On any road which the operator intends to use in his mining operations, so long as said road has not been abandoned. [1971, ch. 206, § 10, p. 898.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

**Sec. to sec. ref.** This section is referred to in §§ 47-1508, 47-1512 and 47-1513.

**47-1511. Reclamation activities — Time limitations.** — (a) All reclamation activities required to be conducted under this act shall be performed in a good and workmanlike manner, with all reasonable diligence, and as to a given exploration drill hole, road or trench, within one (1) year after abandonment thereof.

(b) The reclamation activity as to a given mine panel shall be commenced within one (1) year after surface mining operations have permanently ceased as to such mine panel, provided, however, that in the event that during the course of surface mining operations on a given mine panel, the operator permanently ceases disposing of overburden on a given overburden pile, or permanently ceases removing minerals from a given pit, or permanently ceases using a given road or other affected land, then the reclamation activities to be conducted hereunder as to such pit, road, overburden pile, or other affected land, shall be commenced within one (1) year after such termination, despite the fact that all operations as to the mine panel, which includes such pit, road, overburden pile, or other affected land, have not permanently ceased. It shall be presumed that the operator has permanently ceased surface mining operations as to a given affected land if no substantial amount of overburden has been placed on the overburden pile in question or if no minerals have been removed from the pit in question, as the case may be, for a period of three (3) years.

This presumption may be rebutted by evidencing, in writing, to the board what surface mining operations the operator has planned on the pit, road, overburden pile, or other affected land not used within a three (3) year period. Should the board determine that the operator, in good faith, intends to continue the surface mining operation within a reasonable period of time, it shall, in writing, so notify the operator. Should the board determine that the operation will not be continued within a reasonable period of time, the board shall proceed as though the surface mining operation has been abandoned. [1971, ch. 206, § 11, p. 898.]

**Compiler's notes.** For the words "this act" see compiler's note, § 47-1501.

**Sec. to sec. ref.** This section is referred to in § 47-1513.

**Trespassers on Mining Lands.**

Since the Idaho Surface Mining Act (§§ 47-1501 — 47-1518) provides no affirmative duty

to protect trespassers on mining lands, and it applies only after abandonment of the mine, the act created no duty of care in favor of the plaintiff, a trespasser, who was injured when he fell over the edge of a sandpit. *Cooper v. Unimin Corp.*, 639 F. Supp. 1208 (D. Idaho 1986).

**47-1512. Performance bond — Requisites.** — (a) Prior to conducting any surface mining operations on a mine panel covered by an approved reclamation plan, an operator shall submit to the board a bond meeting the requirements of this section. The penalty of the initial bond filed prior to conducting any surface mining operations on a mine panel shall be in an amount determined by the board to be the estimated reasonable costs of reclamation required in this chapter, in the event of failure to reclaim by an operator, of affected lands proposed to be mined during the next calendar



year plus ten percent (10%) of such costs as to the acreage of affected land designated by the operator pursuant to section 47-1506(a)(1)(vi), Idaho Code, and subsection (b) of this section. The determination of the bond amount shall constitute a final decision subject to judicial review as set forth in subsection (a) of section 47-1514, Idaho Code. In lieu of any bond required hereunder, the operator may deposit cash and governmental securities with the board, in an amount equal to that of the required bond, on the conditions as prescribed in this section.

(b) Prior to the time that lands designated to become affected lands on a mine panel, in addition to those designated pursuant to section 47-1506(a)(1)(vi), Idaho Code, become affected land, the operator shall submit to the board a bond meeting the requirements of section 47-1512(c), Idaho Code, and the penalty of such bond shall be in the amount necessary to insure the performance of the duties of the operator under this act as to such affected lands actually proposed to be mined within the next calendar year. If additional acreage is subsequently proposed to be mined by an operator, the penalty of such bond shall be in an amount determined by the board to be the estimated reasonable costs of reclamation required by this chapter, in the event of failure to reclaim by an operator, of affected lands proposed to be mined during the next calendar year plus ten percent (10%) of such costs.

(c) Except as provided in this subsection, no bond submitted pursuant to this act shall exceed two thousand five hundred dollars (\$2,500) for any given acre of such affected land. The board may require a bond in excess of two thousand five hundred dollars (\$2,500) for any given acre of affected land only when the following conditions have been met:

(1) The board has determined that such bond is necessary to meet the requirements of sections 47-1506, 47-1509, 47-1510 and 47-1511, Idaho Code.

(2) The board has delivered to the operator, in writing, a notice setting forth the reasons it believes such bond is necessary.

(3) The board has conducted a hearing where the operator is allowed to give testimony concerning the amount of the proposed bond. The hearing shall be held under such rules as promulgated by the board. This requirement for a hearing may be waived, in writing, by the operator. Any hearing held shall not extend the period of time limit in which the board must act on a plan submitted.

(d) Any bond required under this act to be filed and maintained with the board shall be in such form as the board prescribes, payable to the state of Idaho, conditioned that the operator shall faithfully perform all requirements of this act and comply with all rules of the board in effect as of the date of approval of the reclamation plan approved for said lands made in accordance with the provisions of this act. An operator may at any time file a single bond in lieu of separate bonds filed or to be filed pursuant to this act, provided that the penalty of such single bond shall be equal to the total of the penalties of the separate bonds being combined into a single bond. Further, any bond provided to an entity of the federal government that also meets the requirements in this section shall be deemed to be sufficient surety for the purposes of this act.

(e) A bond filed as above prescribed shall not be canceled by the surety, except after not less than ninety (90) days' notice to the board. Upon failure of the operator to make substitution of surety prior to the effective date of cancellation of the bond or within thirty (30) days following notice of cancellation by the board, whichever is later, the board shall have the right to issue a cease and desist order and seek injunctive relief to stop the operator from conducting operations upon the lands covered by such bond until such substitution has been made.

(f) If the license to do business in this state of any surety, upon a bond filed with the board pursuant to this act, shall be suspended or revoked, the operator, within thirty (30) days after receiving notice thereof from the board, shall substitute for such surety a good and sufficient corporate surety licensed to do business in this state or other surety acceptable to the board. Upon failure of the operator to make substitution of surety, the board shall have the right to issue a cease and desist order and seek injunctive relief to stop the operator from conducting operations upon the lands covered by such bond until such substitution has been made.

(g) When an operator shall have completed all requirements under the provisions of this act as to any affected land, he shall notify the board. Within thirty (30) days after the receipt of such notice, the board shall notify the operator as to whether or not the reclamation performed meets the requirements of the reclamation plan pertaining to the land in question. Upon the determination by the board that the requirements of the reclamation plan in question have been met as to said lands, the amount of bond in effect as to such lands shall be reduced by an amount designated by the board to reflect the reclamation done.

(h) An operator may withdraw any land previously designated as affected land within a mine panel, provided that it is not already affected land, and in such event, he shall notify the board and the amount of the bond in effect as to the lands in that mine panel shall be reduced by an amount designated by the board as the amount which would have been necessary to reclaim such lands. [1971, ch. 206, § 12, p. 898; am. 1980, ch. 206, § 1, p. 471; am. 1985, ch. 123, § 1, p. 304; am. 1988, ch. 223, § 2, p. 424; am. 1997, ch. 269, § 4, p. 772.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Section 1 of S.L. 1988, ch. 223 is compiled as § 47-1505.

Section 3 of S.L. 1997, ch. 269 is compiled as § 47-1508.

**47-1513. Operator's failure to comply — Forfeiture of bond — Penalties — Reclamation fund.** — (a) Whenever the board determines that an operator has not complied with the provisions of this act, the board may notify the operator of such noncompliance, and may by private conference, conciliation, and persuasion, endeavor to remedy such violation. In the event of a violation referred to in subsections (d) and (e) of this section, the board may proceed without an administrative action, hearing or decision to exercise the remedies set forth in said subsections. Additionally, no administrative action, hearing or decision shall be required from the



Idaho board of environmental quality prior to the board proceeding under subsections (d) and (e) of this section. In the event of the failure of any conference, conciliation and persuasion to remedy any alleged violation, the board may cause to have issued and served upon the operator alleged to be committing such violation, a formal complaint which shall specify the provisions of this act which the operator allegedly is violating, and a statement of the manner in and the extent to which said operator is alleged to be violating the provisions of this act. Such complaint may be served by certified mail, and return receipt signed by the operator, an officer of a corporate operator, or the designated agent of the operator shall constitute service. The operator shall answer the complaint and request a hearing before a designated hearing officer within thirty (30) days from receipt of the complaint if matters asserted in the complaint are disputed. If the operator fails to answer the complaint and request a hearing, the matters asserted in the complaint shall be deemed admitted by the operator, and the board may proceed to cancel the reclamation plan and forfeit the bond in the amount necessary to reclaim affected lands. Upon request for a hearing by an operator, the board shall schedule a hearing before a hearing officer appointed by the board at a time not less than thirty (30) days after the date the operator requests a hearing. The board shall issue subpoenas at the request of the director of the department of lands and at the request of the charged operator, and the matter shall be otherwise handled and conducted in accordance with chapter 52, title 67, Idaho Code. The hearing officer shall, pursuant to said hearing, enter an order in accordance with chapter 52, title 67, Idaho Code, which, if adverse to the operator, shall designate a time period within which corrective action should be taken. The time period designated shall be long enough to allow the operator, in the exercise of reasonable diligence, to rectify any failure to comply designated in said order. In the event that the operator takes such action as is necessary to comply with the order within the time period designated in said order, no further action shall be taken by the board to compel performance under the act.

(b) Upon request of the board, the attorney general shall institute proceedings to have the bond of an operator forfeited for the violation by the operator of an order entered pursuant to this section.

(c) The forfeiture of such bond shall fully satisfy all obligations of the operator to reclaim the affected land under the provisions of this act. If the violation involves an operator that has not furnished a bond required by this act, or an operator that is not required to furnish a bond pursuant to this act, or an operator who violates this act by performing an act not included in the original approved reclamation plan, and such departure from the plan is not subsequently approved, such operator shall be subject to a civil penalty for his failure to comply with such order in the amount determined by the board to be the anticipated cost of reasonable reclamation of affected lands.

(d) Notwithstanding any other provisions of this act, the board may commence an action without bond or undertaking, in the name of the state of Idaho to enjoin any operator who is conducting operations without an

approved reclamation plan required by section 47-1506, Idaho Code, or without the bond required by this act. The court, or a judge thereof at chambers, if satisfied from the complaint or by affidavits that such acts have been or are being committed, shall issue a temporary restraining order without notice or bond, enjoining the defendant, his agents, and employees from conducting such operations without said reclamation plan or bond. Upon a showing of good cause therefor, the temporary restraining order may require the defendant to perform reclamation of the mined area in conformity with sections 47-1509 and 47-1510, Idaho Code, pending final disposition of the action. The action shall then proceed as in other cases for injunctions. If it is established at trial that the defendant has operated without an approved reclamation plan or bond, the court shall enter, in addition to any other order, a decree enjoining the defendant, his agents and employees from thereafter conducting such activities or similar actions in violation of this act. The board may, in conjunction with its injunctive procedures, proceed in the same or in a separate action to recover from an operator who is conducting surface mining or exploration operations without the required plan or bond, the cost of performing the reclamation activities required by sections 47-1509 and 47-1510, Idaho Code, from any such operator who has not filed a bond to cover the cost of the reclamation required.

(e) Notwithstanding any other provision of this act, the board may, without bond or undertaking and without any administrative action, hearing or decision, commence an action in the name of the state of Idaho (1) to enjoin a permitted surface mining operation when, under an existing approved plan, an operator violates the terms of the plan and where immediate and irreparable injury, loss or damage may result to the state and (2) to recover the penalties and to collect civil damages provided for by law.

(f) In addition to the procedures set forth in subsections (a), (d) and (e) of this section, and in addition to the civil penalty provided in subsection (c) of this section, any operator who violates any of the provisions of this act or rules adopted pursuant thereto, or who fails to perform the duties imposed by these provisions, or who violates any determination or order promulgated pursuant to the provisions of this act, shall be liable to a civil penalty of not less than five hundred dollars (\$500) nor more than two thousand five hundred dollars (\$2,500) for each day during which such violation continues, and in addition may be enjoined from continuing such violation. Such penalties shall be recoverable in an action brought in the name of the state of Idaho by the attorney general in the district court for the county where the violation, or some part thereof, occurs, or in the district court for the county wherein the defendant resides. All sums recovered shall be placed in the state treasury and credited to the surface mining reclamation fund, which is hereby created, to be used to reclaim affected lands and to administer this act.

(g) Any person who wilfully and knowingly falsifies any records, information, plans, specifications, or other data required by the board or wilfully fails, neglects, or refuses to comply with any of the provisions of this act



shall be guilty of a misdemeanor and shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000) or imprisonment not to exceed one (1) year or both.

(h) Reclamation plans approved by the board as of January 1, 1997, shall be deemed to be in full compliance with the requirements of this act. However, the board may periodically review, and revise if necessary to meet the requirements of sections 47-1506, 47-1509, 47-1510 and 47-1511, Idaho Code, the amount, terms and conditions of any bond when there is a material change in the reclamation plan or a material change in the estimated reasonable costs of reclamation determined pursuant to section 47-1512, Idaho Code. Any revision to the amount, terms and conditions of a bond due to a material change in the reclamation plan shall apply only to the affected lands covered by the material change in the reclamation plan. [1971, ch. 206, § 13, p. 898; am. 1973, ch. 180, § 5, p. 415; am. 1974, ch. 17, § 37, p. 308; am. 1985, ch. 123, § 2, p. 304; am. 1988, ch. 223, § 3, p. 424; am. 1993, ch. 216, § 47, p. 587; am. 1997, ch. 269, § 5, p. 772; am. 2001, ch. 103, § 88, p. 253.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Sections 36 and 38 of S.L. 1974, ch. 17, are compiled as §§ 47-1504 and 47-1515.

Sections 46 and 48 of S.L. 1993, ch. 216 are compiled as §§ 47-1505 and 49-436 (now repealed), respectively.

Sections 87 and 89 of S.L. 2001, ch. 103 are compiled as §§ 47-1315 and 49-2203, respectively.

**Sec. to sec. ref.** This section is referred to in § 47-1503.

**47-1514. Appeal from final order — Procedure.** — (a) Any operator dissatisfied with any final order of the board made pursuant to this act may, within sixty (60) days after notice of such order, obtain judicial review thereof by appealing to the district court of the state of Idaho for the county wherein the operator resides or has a place of business, or to the district court for the county in which the land or any portions thereof affected by the order is located. Such appeal shall be perfected by filing with the clerk of such court, in duplicate, a notice of appeal, together with a complaint against the board, in duplicate, which shall recite the prior proceedings before the board or hearing officer, and shall state the grounds upon which the petitioner claims he is entitled to relief. A copy of the summons and complaint shall be delivered to the board or such person or persons as the board may designate to receive service of process. The clerk of the court shall immediately forward a copy of the notice of appeal and complaint to the board, which shall forthwith prepare, certify and file in said court, a true copy of any decision, findings of fact, conclusions or order, together with any pleadings upon which the case was heard and submitted to the board or hearing officer, and shall, upon order of the court, provide transcripts of any record, including all exhibits and testimony of any proceedings in said matter before the board or any of its subordinates. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits, including, but not limited to, the rights of appeal to the Supreme Court of the state of Idaho.

(b) When the board finds that justice so requires, it may postpone the effective date of a final order made, pending judicial review. The reviewing court, including the court to which a case may be taken on appeal, may issue all necessary and appropriate orders to postpone the effective date of any final order pending conclusion of the review proceedings.

(c) Notwithstanding any other provision of this act concerning administrative or judicial proceedings, whenever the board determines that an operator has not complied with the provisions of this act, the board may file a civil action in the district court for the county wherein the violation, or some part thereof, occurs, or in the district court for the county wherein the defendant resides. The board may request the court to issue an appropriate order to remedy the violation. The right of appeal to the Supreme Court of the state of Idaho shall be available. [1971, ch. 206, § 14, p. 898; am. 1973, ch. 180, § 6, p. 415.]

**Compiler's notes.** For the words "this act" see compiler's note, § 47-1501.

Section 7 of S.L. 1973, ch. 180, declared an

emergency. Approved March 16, 1973.

**Sec. to sec. ref.** This section is referred to in § 47-1512.

**47-1515. Information.** — Any information supplied by an operator to the board, the director, or the department of lands, and designated by such operator as confidential, shall be subject to disclosure according to chapter 3, title 9, Idaho Code. [1971, ch. 206, § 15, p. 898; am. 1974, ch. 17, § 38, p. 308; am. 1990, ch. 213, § 66, p. 480.]

**Compiler's notes.** Sections 37 and 39 of S.L. 1974, ch. 17, are compiled as §§ 47-1513 and 58-101.

Sections 65 and 67 of S.L. 1990, ch. 213 are compiled as §§ 47-1506 and 48-612, respectively.

Section 75 of S.L. 1974, ch. 17 provided that the act should take effect on and after July 1, 1974.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**Sec. to sec. ref.** This section is referred to in § 47-1505.

**47-1516. Deposit of forfeitures and damages.** — All forfeitures and civil damages collected under the provisions of this act shall be deposited with the state treasurer in a special fund to be used by the board for surface mined land reclamation purposes. [1971, ch. 206, § 16, p. 898.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

**47-1517. Conduct of explorations.** — An operator shall conduct all exploration and mining operations in accordance with all applicable statutes and regulations pertaining to water use and mining safety applicable to exploration and surface mining operations. [1971, ch. 206, § 17, p. 898.]

**Compiler's notes.** For the words "this act" see Compiler's notes, § 47-1501.

Section 18 of S.L. 1971, ch. 206, provided: "The provisions of this act are hereby declared to be severable and if any provision of this act

or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."



**47-1518. Effective date — Application of act.** — This act shall be in full force and effect on and after May 31, 1971. An operator shall not be required to perform the reclamation activities referred to in this act as to any surface mining operations performed prior to May 31, 1972, and further, shall not be required to perform such reclamation activities as to any pit or overburden pile as it exists prior to May 31, 1972. [1971, ch. 206, § 19, p. 898.]

**Compiler's notes.** For the words "this act", see Compiler's notes, § 47-1501.

**47-1519. Application of chapter to mineral extraction for public highway purposes.** — Notwithstanding any other provision of law to the contrary, the bonding provisions of this chapter shall not apply to any surface mining operations conducted by a public or governmental agency for maintenance, repair, or construction of a public highway. Surface mining operations conducted by a public or governmental agency for maintenance, repair, or construction of a public highway which disturb two (2) or more acres shall comply with the provisions of section 47-1506, Idaho Code, as though all minerals were mined for the purpose of immediate or ultimate sale. Surface mining operations conducted by a public or governmental agency for maintenance, repair or construction of a public highway which disturb less than two (2) acres are exempt from the provisions of section 47-1506, Idaho Code. The extraction of minerals from within the right-of-way of a public highway by a public or governmental agency for maintenance, repair or construction of a public highway shall not be deemed surface mining operations under this chapter, provided that the affected land is an integral part of the public highway. [I.C., § 47-1519, as added by 1991, ch. 299, § 1, p. 786.]

## CHAPTER 16

### GEOTHERMAL RESOURCES

#### SECTION.

- 47-1601. Geothermal resources — Land leases — Authorization.
- 47-1602. "Geothermal resources" defined.
- 47-1603. Rules and regulations.
- 47-1604. Leases restricted.
- 47-1605. Leases — Rental and royalty.
- 47-1606. Leases — Purposes for which land used.
- 47-1607. Leases — Assignment or transfer — Restrictions.

#### SECTION.

- 47-1608. Bond.
- 47-1609. Leases — Cancellation.
- 47-1610. Constitutional requirements — Compliance.
- 47-1611. Cooperative agreements and modification of leases authorization.

**47-1601. Geothermal resources — Land leases — Authorization.** — The state board of land commissioners is hereby authorized and empowered to lease for a term of ten (10) years, and as long thereafter as geothermal resources are produced in paying quantities, or as much longer thereafter as the lessee in good faith shall conduct geothermal resource well drilling or construction operations, thereon, or for such lesser term as it

finds to be in the public interest, any state or school lands which may contain geothermal resources, together with the right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to the prospecting for, exploration for, drilling or other well construction for, and production of geothermal resources. [I.C., § 47-1601, as added by 1972, ch. 182, § 1, p. 467.]

**Cross ref.** Geothermal resources act,  
§§ 42-4001 — 42-4015.

**47-1602. "Geothermal resources" defined.** — For the purposes of this chapter, "geothermal resources" shall mean the natural heat energy of the earth, the energy, in whatever form, which may be found in any position and at any depth below the surface of the earth present in, resulting from, or created by, or which may be extracted from, such natural heat, and all minerals in solution or other products obtained from the material medium of any geothermal resource. Geothermal resources are found and hereby declared to be *sui generis*, being neither a mineral resource nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water resources in many instances. No right to seek, obtain, or use geothermal resources has passed or shall pass with any existing or future lease of state or school lands, including but not limited to, mineral leases and leases issued under chapter 8, title 47, Idaho Code. [I.C., § 47-1602, as added by 1972, ch. 182, § 1, p. 467.]

**47-1603. Rules and regulations.** — The state board of land commissioners is hereby authorized and empowered to adopt such rules and regulations governing the issuance of geothermal resource leases and governing the conduct of any operations thereunder. [I.C., § 47-1603, as added by 1972, ch. 182, § 1, p. 467.]

**47-1604. Leases restricted.** — No single geothermal resource lease issued under this chapter shall be for an area exceeding one (1) section, provided that any one (1) person may hold more than one lease. [I.C., § 47-1604, as added by 1972, ch. 182, § 1, p. 467.]

**47-1605. Leases — Rental and royalty.** — Geothermal resources leases shall be issued at an annual rental of not less than twenty-five cents (25¢) per acre, payable in advance and a royalty which shall not be less than ten per centum (10%) of the geothermal resources produced from the lands under lease or the value thereof. The rentals and the royalties specified in geothermal leases shall be fixed in any manner, including but not limited to competitive bidding, or according to any formula as the state board of land commissioners finds will maximize public benefits from such leases. Royalties shall be paid in addition to rental payments, at the discretion of the board of land commissioners. [I.C., § 47-1605, as added by 1972, ch. 182, § 1, p. 467; am. 1985, ch. 124, § 1, p. 308.]

**47-1606. Leases — Purposes for which land used.** — The state board of land commissioners shall have the right to lease state or school



lands for grazing, agricultural, or other purposes, as may be otherwise provided by law, and to issue geothermal resource leases covering lands leased for grazing, agricultural, or other purposes, provided however, that the lessee under a geothermal resource lease issued under the provisions of this chapter shall have paramount right to the use of so much of the surface of the land as shall be necessary for the purposes of his lease and shall have the right to ingress and egress at all times during the term of such lease. [I.C., § 47-1606, as added by 1972, ch. 182, § 1, p. 467.]

**47-1607. Leases — Assignment or transfer — Restrictions.** — No geothermal resource lease, which shall be issued under the provisions of this chapter, shall be assignable or transferable except upon the written consent of the state board of land commissioners. [I.C., § 47-1607, as added by 1972, ch. 182, § 1, p. 467.]

**47-1608. Bond.** — (1) The board shall require the execution of a good and sufficient bond in an amount the board determines reasonable, which shall not be less than one thousand dollars (\$1,000) in favor of the state of Idaho conditioned upon the payment of all damages to the land surface and improvements thereon, whether or not the lands have been sold or leased for any other purpose.

(2) Upon commencement of operations for the drilling of any geothermal resource well, the lessee shall be required by the board to furnish such a bond as the board determines reasonable which shall not be less than six thousand dollars (\$6,000) which bond shall be in lieu of the bond required in subsection (1) of this section and shall cover all subsequent operations on such lease. [I.C., § 47-1608, as added by 1972, ch. 182, § 1, p. 467; am. 1993, ch. 289, § 1, p. 1081.]

**47-1609. Leases — Cancellation.** — The state board of land commissioners shall reserve and may exercise the authority to cancel any geothermal resource lease upon failure by the lessee to exercise due diligence or care in the prosecution of his operations in accordance with the terms and conditions stated in such lease and with all laws of the state of Idaho, and shall insert in every such lease appropriate provisions for its cancellation by the board in the event of noncompliance upon the part of the lessee. [I.C., § 47-1609, as added by 1972, ch. 182, § 1, p. 467.]

**47-1610. Constitutional requirements — Compliance.** — All grants and permissions under this act shall be executed as required by the Constitution of the state of Idaho, Article IV, section 16. [I.C., § 47-1610, as added by 1972, ch. 182, § 1, p. 467.]

**47-1611. Cooperative agreements and modification of leases authorization.** — The state board of land commissioners is a person authorized to join on behalf of the state of Idaho in agreements for cooperative or unit plans of development or operation of the geothermal resources of geothermal resource areas involving state or school lands and to do all

things necessary to make operative such plan or plans subject to any and all provisions of state and federal law; and for such purposes the board is hereby authorized with the consent of its lessees to modify and change any and all terms of leases issued by it to facilitate efficiency and resource conservation in geothermal resource operations on and from lands under its jurisdiction; provided however, that said board shall not use or contract to use funds under its control for the purpose of drilling or otherwise paying the cost of geothermal resource operations. [I.C., § 47-1611, as added by 1972, ch. 182, § 1, p. 467.]

**Compiler's notes.** Section 2 of S.L. 1972, ch. 182 declared an emergency. Approved March 17, 1972.

## CHAPTER 17

### IDAHO ABANDONED MINE RECLAMATION ACT

#### SECTION.

47-1701. Purpose of act.

47-1702. Short title.

47-1703. Funding.

47-1704. Definitions.

47-1705. Responsibility of state board of land commissioners.

#### SECTION.

47-1706. Duties and powers of board.

47-1707. Priorities.

47-1708. Interagency coordination.

**47-1701. Purpose of act.** — It is the purpose of this act to provide for the reclamation of abandoned mines on state and federal lands and on certain private lands, thereby protecting human health, safety and welfare, conserving natural resources, aiding in the protection of wildlife, aquatic resources, domestic animals, and reducing soil erosion. [I.C., § 47-1701, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 3, p. 105.]

**Compiler's notes.** The words "this act" refer to S.L. 1994, ch. 220, which is compiled as §§ 47-1701 through 47-1708.

**47-1702. Short title.** — This act may be known and cited as the "Idaho Abandoned Mine Reclamation Act." [I.C., § 47-1702, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 4, p. 105.]

**Compiler's notes.** For words "this act," see Compiler's notes, § 47-1701.

**47-1703. Funding.** — This chapter shall govern the use of state and federal moneys specifically appropriated for abandoned mine reclamation. This chapter shall not require the state to expend or appropriate state moneys. The board may receive federal funds, state funds, and any other funds, and, within the limits imposed by a specific grant, expend them as directed by this chapter. All grants, funds, fees, fines, penalties and other uncleared money which has been or will be paid to the state for abandoned mine reclamation shall be placed in the state treasury and credited to the abandoned mine reclamation account, which is hereby created. This account



shall be available to the board, by legislative appropriation, and shall be expended for the reclamation of lands affected by eligible mining operations. Any unencumbered and unexpended balance of this account remaining at the end of a fiscal year shall not lapse but shall be carried forward for the purposes of this chapter until expended or until modified by subsequent statute. [I.C., § 47-1703, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 5, p. 105.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 47-1701.

**Sec. to sec. ref.** This section is referred to  
in § 47-1206.

**47-1704. Definitions.** — (1) "Abandoned mine" means a mine deserted by the operator, having no regular maintenance, and not covered by a valid mining claim.

(2) "Affected land" means the land adjacent to an eligible mine that is, or may be, adversely affected by past mining operations.

(3) "Board" means the state board of land commissioners or such department, commission, or agency as may lawfully succeed to the powers and duties of such board.

(4) "Director" means the head of the department of lands or such officer as may lawfully succeed to the powers and duties of said director.

(5) "Eligible mine" means an abandoned mine located on land owned by the state or federal government or an abandoned mine located on private land when the owner of the private land has requested, and the board has granted, designation as an eligible mine.

(6) "Mine" means an area where valuable minerals were extracted from the earth and includes all associated development areas including, but not limited to, milling and processing areas, overburden disposal areas, stockpiles, roads, tailings ponds and other areas disturbed at the mining operation site.

(7) "Operator" means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, either natural or artificial including, but not limited to, every public or governmental agency engaged in mining or mineral exploration operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors and shall mean every governmental agency owning or controlling the use of any mine when the mineral extracted is to be used by or for the benefit of such agency. It shall not include any governmental agency with respect to those mining or mineral exploration operations as to which it grants mineral leases or prospecting permits or similar contracts, but nothing herein shall relieve the operator acting pursuant to a mineral lease, prospecting permit or similar contract from the terms of this chapter.

(8) "Valuable mineral" shall have the same meaning as "valuable mineral" defined in section 47-1205, Idaho Code. [I.C., § 47-1704, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 6, p. 105.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 47-1701.

Section 7 of S.L. 1999, ch. 44, is compiled as  
§ 47-1707.

**47-1705. Responsibility of state board of land commissioners. —** The state board of land commissioners is charged with the responsibility of administering this act in accordance with the purpose of the act and the intent of the legislature. The director of the department of lands shall, upon authorization of the board, exercise the powers and discharge the duties vested in the board by this act. [I.C., § 47-1705, as added by 1994, ch. 220, § 1, p. 702.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 47-1701.

**47-1706. Duties and powers of board. —** In addition to the other duties and powers of the board prescribed by law, the board is granted and shall be entitled to exercise the following authority and powers and perform the following duties:

(1) To reclaim any eligible mine and affected lands. Reclamation on federal lands shall be completed only upon consent of the federal agency responsible for the administration of those lands. Reclamation activities may include:

- (a) The reclamation and restoration of abandoned surface mined areas;
- (b) The reclamation of abandoned milling and processing areas;
- (c) The sealing, filling, and grading of abandoned deep mine entries;
- (d) The planting of land adversely affected by past mining to prevent erosion and sedimentation;
- (e) The prevention, abatement, treatment, and control of water pollution created by abandoned mine drainage;
- (f) The control of surface subsidence due to abandoned deep mines; and
- (g) Such other reclamation activities as may be necessary to accomplish the purposes of this act.

(2) To administer and enforce the provisions of this act and the rules and orders promulgated thereunder as provided in this act.

(3) To conduct and promote the coordination and acceleration of research, studies, surveys, experiments, demonstrations and training in carrying out the provisions of this act. In carrying out the activities authorized in this section, the board may enter into contracts with and make grants to institutions, agencies, organizations and individuals, and shall collect and make available any information obtained therefrom.

(4) To adopt and promulgate reasonable rules respecting the administration of this act and such rules as may be necessary to carry out the intent and purposes of this act. All such rules shall be adopted in accordance with and subject to the provisions of chapter 52, title 67, Idaho Code.

(5) To enter upon eligible mines and affected lands at reasonable times, for inspection purposes and to determine whether the provisions of this act are being complied with. Inspections on private lands shall be conducted in the presence of the landowner or his duly authorized employees or representatives, or with written permission of the landowner. [I.C., § 47-1706, as added by 1994, ch. 220, § 1, p. 702.]



**Compiler's notes.** For words "this act," see Compiler's notes, § 47-1701.

**47-1707. Priorities.** — Expenditure of funds from the abandoned mine reclamation account shall reflect the following priorities in the order stated:

(1) The protection of public health, safety, and general welfare from the adverse effects of past mining practices.

(2) The restoration of land and water resources previously degraded by the adverse effects of past mining practices. [I.C., § 47-1707, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 7, p. 105.]

**Compiler's notes.** Section 6 of S.L. 1999, ch. 44, is compiled as § 47-1704.

**47-1708. Interagency coordination.** — The board shall recognize other governmental, educational, and private organizations or agencies which have expertise and information regarding abandoned mines and affected lands. The board shall characterize, prioritize, and complete reclamation of eligible mines and affected lands in coordination with these agencies. In addition, the board may reasonably compensate them from the abandoned mine reclamation account for services that the board requests they provide. [I.C., § 47-1708, as added by 1994, ch. 220, § 1, p. 702; am. 1999, ch. 44, § 8, p. 105.]

## CHAPTER 18

### FINANCIAL ASSURANCE

**SECTION.**

47-1801. Purpose.

47-1802. Applicability.

47-1803. Reclamation fund created — Financial assurance.

**SECTION.**

47-1804. Cost recovery.

47-1805. Operations not approved.

**47-1801. Purpose.** — The purpose of this chapter is to provide an alternative form of performance bond or financial assurance for mining operations and mineral leases as required by the state board of land commissioners. [I.C., § 47-1801, as added by 2002, ch. 153, § 1, p. 448.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 153 declared an emergency. Approved March 20, 2002.

**47-1802. Applicability.** — Mine operators who are working under the requirements of title 47, Idaho Code, may be required to provide alternative financial assurance, and if so required, shall provide such alternative financial assurance in accordance with the provisions of this chapter. [I.C., § 47-1802, as added by 2002, ch. 153, § 1, p. 448.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 153 declared an emergency. Approved March 20, 2002.

**47-1803. Reclamation fund created — Financial assurance. —**

(1) The state treasurer shall be the custodian of an interest-bearing, dedicated fund known as the "Reclamation Fund" which is hereby created. The reclamation fund shall be funded by payments from applicable parties, interest and cost recoveries initiated by the state board of land commissioners. All payments, interest and cost recoveries shall be established by the state board of land commissioners.

(2) An operator's commitment to reclaim affected lands and operator's payments to the reclamation fund shall be documented on a department of lands form requiring that the operator shall faithfully perform the requirements of the approved plan and comply with all administrative rules and policy governing the operation.

(3) Moneys accruing to or received by the fund shall be expended by the department of lands, after approval by the state board of land commissioners and upon legislative appropriation, for reclamation of mines subject to the provisions of this chapter. Moneys in excess of those needed for reclamation liabilities shall be utilized, after approval of the state board of land commissioners, for mine administration, abandoned mine land reclamation or educational purposes. The state board of land commissioners shall adopt policy to determine an appropriate minimum balance to be maintained in the reclamation fund for reclamation liabilities. [I.C., § 47-1803, as added by 2002, ch. 153, § 1, p. 448.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 153 declared an emergency. Approved March 20, 2002.

**47-1804. Cost recovery. —** If an operator fails to provide financial assurance as required by the provisions of this chapter, or has forfeited moneys from the reclamation fund and has not repaid those moneys, the state board of land commissioners shall be authorized to file liens against personal property and equipment of the operator to recover costs. The operator shall be liable for the actual cost of the required financial assurance, reclamation costs and administrative costs incurred by the department of lands. [I.C., § 47-1804, as added by 2002, ch. 153, § 1, p. 448.]

**Compiler's notes.** Section 2 S.L. 2002, ch. 153 declared an emergency. Approved March 20, 2002.

**47-1805. Operations not approved. —** The state board of land commissioners shall not approve any application for a reclamation plan, placer permit, mineral lease, or approve an amendment of any such document filed by a company, individual, corporate officer or operator who is not in compliance with applicable mining or leasing statutes or administrative rules, or who has forfeited reclamation funds and has not fully reimbursed the department of lands for the reclamation and administrative costs incurred by the state board of land commissioners, or who has not paid the



required financial assurance. [I.C., § 47-1805, as added by 2002, ch. 153, § 1, p. 448.]

**Compiler's notes.** Section 2 of S.L. 2002, ch. 153 declared an emergency. Approved March 20, 2002.





## TITLE 48

### MONOPOLIES AND TRADE PRACTICES

#### CHAPTER

1. IDAHO COMPETITION ACT, §§ 48-101 — 48-119.
2. ANTI-PRICE DISCRIMINATION ACT, §§ 48-201 — 48-206.
3. FAIR TRADE ACT. [REPEALED.]
4. UNFAIR SALES ACT, §§ 48-401 — 48-413.
5. REGISTRATION AND PROTECTION OF TRADEMARKS, §§ 48-501 — 48-518.
6. CONSUMER PROTECTION ACT, §§ 48-601 — 48-619.
7. SHOPLIFTING, §§ 48-701 — 48-705.
8. IDAHO TRADE SECRETS ACT, §§ 48-801 — 48-807.
9. NEW MOTOR VEHICLE WARRANTIES — MANUFACTURER'S DUTY TO REPAIR, REFUND. OR REPLACE, §§ 48-901 — 48-913.

#### CHAPTER

10. IDAHO TELEPHONE SOLICITATION ACT, §§ 48-1001 — 48-1010.
11. IDAHO PAY-PER-TELEPHONE CALL ACT, §§ 48-1101 — 48-1108.
12. IDAHO CHARITABLE SOLICITATION ACT, §§ 48-1201 — 48-1206.
13. MUSIC LICENSING AND COPYRIGHT ENFORCEMENT ACT, §§ 48-1301 — 48-1308.
14. ASSISTIVE TECHNOLOGY WARRANTY ACT, §§ 48-1401 — 48-1407.
15. IDAHO NONPROFIT HOSPITAL SALE OR CONVERSION ACT, §§ 48-1501 — 48-1512.
16. HEALTH-RELATED CASH DISCOUNT CARDS, §§ 48-1601 — 48-1603.

## CHAPTER 1

### IDAHO COMPETITION ACT

#### SECTION.

- 48-101. Short title.
- 48-102. Legislative findings, purpose, interpretation and scope of chapter.
- 48-103. Definitions.
- 48-104. Unreasonable restraint of trade or commerce.
- 48-105. Monopolies.
- 48-106. Acquisitions that substantially lessen competition.
- 48-107. Exempt activities.
- 48-108. Civil actions and settlements by the attorney general.
- 48-109. Civil investigations.
- 48-110. Failure to obey civil investigative demand or subpoena.

#### SECTION.

- 48-111. Violation of court orders and consent decrees — Penalties.
- 48-112. Additional relief of district court authorized.
- 48-113. Private causes of action.
- 48-114. Awards to the attorney general — Use of moneys.
- 48-115. Statute of limitations.
- 48-116. Action not barred because it affects interstate or foreign commerce.
- 48-117. Service of notice.
- 48-118. Venue.
- 48-119. [Repealed.]

**48-101. Short title.** — This act shall be known and may be cited as the "Idaho Competition Act." [I.C., § 48-101, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-101, which comprised 1911, ch. 215, § 1, p. 688; reen. C.L. 107:1; C.S., § 2531; I.C.A., § 47-101, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this act" refer to S.L. 2000, ch.

148, which is compiled as §§ 48-101 — 48-118.

Section 4 of S.L. 2000, ch. 148, is compiled as § 18-7803.

**Cross ref.** Perjury, subornation of perjury, §§ 18-5401 — 18-5414.

#### DECISIONS UNDER PRIOR LAW

**Cited in:** Hurt v. Brandt, 37 Idaho 186, 215 P. 842 (1923); Boise Valley Traction Co. v. Ada

County, 38 Idaho 350, 222 P. 1035 (1923); Twin Falls Farm & City Distributing, Inc. v. D

& B Supply Co. Inc., 96 Idaho 351, 528 P.2d 1286 (1974); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 647 F. Supp. 190 (D. Idaho 1985).

#### ANALYSIS

Applicability to municipal corporations.

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Unfair competition.

#### Applicability to Municipal Corporations.

This section is not applicable to municipal corporations. *Denman v. City of Idaho Falls*, 51 Idaho 118, 4 P.2d 361 (1931).

#### Application.

This section addresses only conspiracies or other combinations in restraint of trade. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

This section is not applicable to municipal corporations.

Because this section specifically addresses the subject of attorney fees in cases brought under the antitrust law, it was more specific than § 12-120(3), and was controlling in an action arising from a reimbursement agreement regarding sale of prescription drugs to health insurer's subscribers. *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 918 P.2d 595 (1996).

#### Attorney Fees.

The peculiar nature of a legal malpractice action requires the action to proceed as a suit within a suit; therefore, an award of attorney

fees pursuant to the underlying antitrust action constitutes a part of the measure of damages in the malpractice case, and must be submitted as part of the proof of damages under the antitrust claim; it is not sufficient to file a post-trial affidavit of costs and fees under I.R.C.P. 54(d). *Fitzgerald v. Walker*, 121 Idaho 589, 826 P.2d 1301 (1992).

#### Concerted Action.

Concerted action is not necessary to have a violation of this section. *Twin Falls Farm & City Dist., Inc. v. D & B Supply Co., Inc.*, 96 Idaho 351, 528 P.2d 1286 (1974).

#### Conspiracy.

Employer and his employees were held not guilty of conspiracy to drive competitor out of business, since acts of employees were, in effect, acts of employer. *Udelavitz v. Idaho Junk House*, 46 Idaho 441, 268 P. 15 (1928).

An internal division of a corporation is incapable of conspiring with that corporation, since they are one and the same, and the plurality of actors required for conspiracy is absent. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Since a conspiracy requires the agreement of at least two individuals, a finding of conspiracy against one defendant cannot be upheld where the other alleged conspirators are tried and absolved of participation in the same proceeding. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Power supplier's antitrust claims failed because a conspiracy among power company, its officers, directors, and agents did not provide the predicate for a successful antitrust claim under the statutes of Idaho. *Afton Energy, Inc. v. Idaho Power Co.*, 122 Idaho 333, 834 P.2d 850 (1992).

The federal courts have placed a "gloss" on the contract element of the federal statute requiring also that there be a "unity of purpose" between the contracting parties to violate the antitrust laws. This element is also a requirement of this section. *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 918 P.2d 595 (1996).

An internal division of a corporation is incapable of conspiring with that corporation, since they are one and the same, and the plurality of actors required for conspiracy is absent. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

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the predicate for a successful antitrust claim under the statutes of Idaho. *Afton Energy, Inc. v. Idaho Power Co.*, 122 Idaho 333, 834 P.2d 850 (1992).

#### **Construction of Federal Antitrust Act Not Binding, When.**

A federal district court was not required, in determining whether the Idaho statute applied to municipal corporations, to follow construction given to the federal antitrust act by the United States Supreme Court, on the ground that the state legislature, in enacting the statute, intended to adopt the construction previously given the federal act by the United States Supreme Court. *Wilcox v. City of Idaho Falls*, 23 F. Supp. 626 (D. Idaho 1938).

#### **Contract Illegal under Federal Law.**

Contract concerning exhibition of motion picture films, which was illegal under Sherman antitrust act U.S.C. tit. 15, §§ 1-7, could not be enforced in action for damages. *Fox Film Corp. v. Tri-State Theatres*, 51 Idaho 439, 6 P.2d 135 (1931).

#### **Deceptive Use of Names.**

Where a complaint alleged that the use of the name "United American Benefit Association, Inc." by the defendant was deceptively similar to the name "American Home Benefit Association, Inc." used by the plaintiff, and alleged that the general public was misled and deceived, and that much embarrassment and inconvenience had been suffered by the plaintiff as a result of the similarity of the names, the complaint was not demurrable on the ground that the plaintiff could not claim exclusive right to the use of the word "American". *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

The specific intent and dangerous probability requirements of attempted monopolization are fulfilled when it is shown that (1) an entity possesses monopoly power, (2) that monopoly power has been employed so that an actual restraint on trade has been accomplished, and (3) the restraint has been obtained in an additional market within the distribution chain of the relevant product. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Elements.**

The basic elements necessary to prove the charge of attempted monopoly under this section are: (1) a specific intent by the defendant to monopolize, and (2) overt acts by the defendant which create a dangerous probability that the intended monopoly will be achieved. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

The specific intent and dangerous probability requirements of attempted monopolization are fulfilled when it is shown that (1) an entity possesses monopoly power, (2) that monopoly power has been employed so that an actual restraint on trade has been accomplished, and (3) the restraint has been obtained in an additional market within the distribution chain of the relevant product. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

There are three essential elements in every private antitrust action: (1) a violation of the antitrust law, (2) direct injury to the plaintiff from such violations, and (3) damages sustained by the plaintiff. Therefore, a finding of a violation by itself does not result in liability. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Injury arising out of a defendant's antitrust violation is an element of proof in establishing civil liability under this section, since injury to a person's business is essential to the cause of action. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **—Control of Market.**

Neither buying in volume nor selling back at a profit is of itself illegal or inherently predatory. Such practices may become illegal or predatory only when used as methods of achieving a corner on a market, i.e., obtaining extensive control over the supply of a product so that the product's price might be artificially set in a manner most profitable to the controlling party, and a determination that such control or pending control exists cannot be made without reference to both the quantity of supply of the particular product and the defendant's share of control over that supply. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

There is no set degree of percentage of market power which must be possessed in order for a defendant to be dangerously close to achieving a monopoly. Rather, in order to determine whether there is a dangerous probability that a monopoly will be achieved, the extent of market power must be evaluated in conjunction with prevailing market conditions, as well as the business policies and performance of the defendant. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Where even liberally construing the record, defendant could have had not more than 24 percent of the insulation market, and in light of the highly competitive nature of the market involved, the claim of attempted monopoly had to fail. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **—Intent.**

Generally, since there is rarely any direct evidence of specific intent to monopolize, its

existence may be inferred from anticompetitive conduct of the defendant. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

A finding that a defendant has engaged in a particular predatory or illegal act, such as selling below cost, is not the equivalent of finding specific intent, but is merely a basis from which such intent may be inferred; and isolated or occasional instances of selling below cost, while predatory or illegal in nature, do not necessarily indicate a specific intent to monopolize. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

The existence of specific intent to monopolize must be determined by weighing all of the circumstances in the particular case, including the nature of the conduct, its consistency and duration, the conditions of the market, and characteristics of the defendant. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Any conduct that constitutes a restraint of trade under § 48-101 would provide a strong basis for inferring specific intent to monopolize. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Exclusive Agency Contracts.**

Contract creating an exclusive agency for the sale on commission of a given commodity in a specific territory and binding the agent not to sell the goods of any other manufacturers was not in violation of antitrust law. *Independent Gas & Oil Co. v. T.B. Smith Co.*, 51 Idaho 710, 10 P.2d 317 (1932).

#### **Fair Market Value.**

Market value has been defined as the price that a reasonably prudent purchaser would pay for the relevant product under the market conditions prevailing at the period of time in question and fair market value may be less than cost. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Geographical Terms.**

Geographical terms and words descriptive of character, quality, or places of manufacture or of sale of articles can not be monopolized as trade-marks. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

#### **Illegal Practices.**

Neither buying in volume nor selling back at a profit is of itself illegal or inherently predatory. Such practices may become illegal or predatory only when used as methods of achieving a corner on a market, i.e., obtaining extensive control over the supply of a product so that the product's price might be artificially set in a manner most profitable to the controlling party, and a determination that such control or pending control exists cannot be

made without reference to both the quantity of supply of the particular product and the defendant's share of control over that supply. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **In General.**

This section and §§ 48-102 and 48-114 are patterned after §§ 1, 2, and 7 of the federal Sherman Antitrust Act and, while federal decisions are not binding in interpreting and applying these sections, they do offer persuasive guidance. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Insufficient Evidence.**

Where the plaintiff makers of promissory notes to the defendant oil company failed to prove by a preponderance of the evidence that the agreement between the parties, whereby the makers of the notes would provide their land to build a gas station and sell the oil company's gasoline products, was an illegal tying arrangement or that the agreement substantially lessened competition or tended to create a monopoly in favor of the oil company, the Idaho Antitrust Law and the Idaho Anti-Price Discrimination Act were not applicable. *Pollard Oil Co. v. Christensen*, 103 Idaho 110, 645 P.2d 344 (1982).

#### **Intent.**

Any conduct that constitutes a restraint of trade under this section would provide a strong basis for inferring specific intent to monopolize. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Labor Combinations.**

Labor is not commodity or article of commerce within purview of statutes. *Robison v. Hotel & Restaurant Employees Local No. 782*, 35 Idaho 418, 207 P. 132, 27 A.L.R. 642 (1922).

Lawful strike is not prevented by this section. *Robison v. Hotel & Restaurant Employees Local No. 782*, 35 Idaho 418, 207 P. 132, 27 A.L.R. 642 (1922).

This section raised no justiciable issue of state law when applied to action by independent contractors against labor organization for damages and injunctive relief from picketing. *Simpkins v. Southwestern Idaho Painters Dist. Council No. 57*, 95 Idaho 165, 505 P.2d 313 (1973).

This section raised no justiciable issue of state law when applied to action by independent contractors against labor organization for damages and injunctive relief from picketing. *Simpkins v. Southwestern Idaho Painters Dist. Council No. 57*, 95 Idaho 165, 505 P.2d 313 (1973).

#### **Municipal Corporations.**

Municipal corporations are not amenable to this chapter. *Wilcox v. City of Idaho Falls*, 23 F. Supp. 626 (D. Idaho 1938); *Denman v. City*



of Idaho Falls, 51 Idaho 118, 4 P.2d 361 (1931).

#### **Municipality As Not Within Statute.**

The Idaho Antitrust Law does not apply to municipal corporations, and hence a holder of notes and bonds of a gas company, whose business was allegedly ruined by the fact that the city operated a hydro-electric plant, and monopolized the gas company's business, could not maintain an action against the city for damages resulting to the holder from the city's acts. *Wilcox v. City of Idaho Falls*, 23 F. Supp. 626 (D. Idaho 1938). See however, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906).

#### **Necessary Allegations.**

In an action under the antitrust law of Idaho, it was necessary that plaintiff not only allege sufficient facts to show a violation of the law by the defendant, but it must also appear that, by such violation of the law, plaintiff had been injured in his business or property. *Hurt v. Brandt*, 37 Idaho 186, 215 P. 842 (1923).

#### **Not Applicable to Municipal Corporations.**

The provisions of this chapter do not apply to municipal corporations, but apply only to private corporations. *Denman v. City of Idaho Falls*, 51 Idaho 118, 4 P.2d 361 (1931).

#### **Per se Violation.**

Because agreements between health insurers and pharmacies to allegedly sell prescription drugs "below cost" did not attempt to fix prices to be charged in transactions with third parties, there was no per se illegal vertical combination. *K. Hefner, Inc. v. Caremark, Inc.*, 128 Idaho 726, 918 P.2d 595 (1996).

#### **Proof of Damages.**

To meet the minimum requirement of proof in market exclusion cases in which lost profits are sought, the plaintiff must normally produce evidence falling into one of the following categories: (1) comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions, (2) comparison of performance of plaintiff's business, with comparable business in an unrestrained market otherwise comparable to plaintiff's market or (3) loss of specific business or customers. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

In an antitrust case under §§ 48-101, 48-102, 48-104, there was no justification for trial court's determination that the gross revenues of the defendant company and subsidiary provided a reasonable foundation for calculating the lost profits of plaintiffs, as such a method of figuring damages assumed, without any support in the record, that the

defendant's operation would not have won any portion of the market absent antitrust violations, and that the plaintiffs had the capacity to assimilate all of the business which defendant performed, and that plaintiffs would have won that business over other insulators who chose not to participate in the action. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

The factfinder may not determine damages by mere speculation and guesswork, and there must be a reasonable foundation established by the evidence from which the factfinder can calculate the amount of damages. It will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Sale of Services.**

Language of this section which prohibits the selling of "any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions" plainly applies only to the sale of an "article or product"; the sale of services is not included. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Sales Below Cost.**

This section does not speak in terms of prohibiting sales below cost. The phrase "below cost" in the world of economics is, without further definition, an imprecise term, not always indicative of anticompetitive conduct. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

While "selling at a loss" might be one factor for a court to consider in determining whether or not specific intent exists to drive a competitor out of business, without additional proof and findings of fact, "selling at a loss" does not constitute a violation of the prohibition against the selling of "any article or product at less than its fair market value ..." *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

#### **Sufficiency of Complaint.**

It was necessary that plaintiff allege not only sufficient facts to show violation of law by defendant, but it must also appear that, by reason of such violation of law, plaintiff had been injured in his business or property. *Hurt v. Brandt*, 37 Idaho 186, 215 P. 842 (1923).

Petition in action for threefold damages need not state facts showing right of action with all fullness and particularity required of indictment, but sufficiency of petition must be tested by local practice obtaining in civil actions. *Hurt v. Brandt*, 37 Idaho 186, 215 P. 842 (1923).

**Sufficient to Convict.**

Defendant, and the corporation for which he worked, violated this section when he tore down a sign placed in an adjoining building by plaintiff to notify its customers that it had moved. *Twin Falls Farm & City Dist., Inc. v. D & B Supply Co., Inc.*, 96 Idaho 351, 528 P.2d 1286 (1974).

**Unfair Competition.**

One is not guilty of unfair competition unless, with the direct purpose of destroying his competitor's business, he forces prices lower than he can honestly believe will yield a profit when he shall have eventually disposed of the commodities purchased. *Udelavitz v. Idaho Junk House*, 46 Idaho 441, 268 P. 15 (1928).

In order to make out a case of "unfair competition," it was not necessary to show that any person had been actually deceived by defendant's conduct and led to purchase his goods in the belief that they were the goods of the plaintiff, or to deal with the defendant thinking that he was dealing with the plaintiff, and it was sufficient to show that such deception would be the natural and probable result of defendant's acts. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

The sale of goods of one manufacturer or vendor as those of another was "unfair competition" and constituted a "fraud" which a court of equity could lawfully prevent by injunction. *American Home Benefit Ass'n v. United Am. Benefit Ass'n*, 63 Idaho 754, 125 P.2d 1010 (1942).

**Collateral References.** 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 787.

54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1063-1065.

55 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 696-713.

58 C.J.S., Monopolies, § 19 et seq.

Agreement between carriers not to enter into competition as being an unlawful restraint of trade. 3 A.L.R. 250; 91 A.L.R. 980.

Enforceability of restrictive covenants in employment contracts. 9 A.L.R. 1456; 20 A.L.R. 861; 29 A.L.R. 1331; 52 A.L.R. 1362; 67 A.L.R. 1002; 98 A.L.R. 963.

Illegality of combinations or agreements

between insurance companies or agents of companies under antitrust and monopoly statutes. 21 A.L.R. 543.

Open competition plans, gentlemen's agreements, and similar arrangements as violations of antitrust acts. 21 A.L.R. 1109.

Applicability of state antitrust act to interstate transaction. 24 A.L.R. 787.

Laundry business as within a statute relating to monopolies. 31 A.L.R. 533.

Contract to sell entire output of a commodity as contrary to public policy or antimonopoly statute. 83 A.L.R. 1173.

Control of prices by contract to keep out of certain business as monopolistic practice. 91 A.L.R. 980.

Right of one not a party to a combination or contract in restraint of trade, to maintain suit to enjoin same or to recover damages he suffers by reason of combination. 92 A.L.R. 185.

Boycott as violating antitrust laws or statutes prohibiting combinations in restraint of trade. 116 A.L.R. 484.

Legality of a combination among building or construction contractors. 121 A.L.R. 345.

Regulations concerning dry cleaning and dyeing establishments as creating a monopoly. 128 A.L.R. 678.

Who are entitled to the benefit of statutes giving the right to combine. 166 A.L.R. 161.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold. 11 A.L.R.2d 1227.

Creation of monopoly as to plumbers and plumbing by regulations concerning the trade. 22 A.L.R.2d 816.

Right of one not a party to a combination or contract in restraint of trade, to maintain suit to enjoin same or to recover damages he suffers by reason of combination. 92 A.L.R. 185.

Creation of monopoly as to plumbers and plumbing by regulations concerning the trade. 22 A.L.R.2d 816.

Illegal acts or practices, right to enjoin business competitor from. 90 A.L.R.2d 7.

Right of corporation to indemnity for civil or criminal liability incurred by employee's violation of antitrust laws. 37 A.L.R.3d 1355.

Enforceability, insofar as restrictions would be reasonable, of contract containing unreasonable restrictions on competition. 61 A.L.R.3d 397.

**48-102. Legislative findings, purpose, interpretation and scope of chapter.** — (1) The Idaho legislature finds that fair competition is fundamental to the free market system. The unrestrained interaction of competitive forces will yield the best allocation of Idaho's economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.



(2) The purpose of this chapter is to maintain and promote economic competition in Idaho commerce, to provide the benefits of that competition to consumers and businesses in the state, and to establish efficient and economical procedures to accomplish these purposes and policies.

(3) The provisions of this chapter shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes and consistent with this chapter's purposes, as set forth in subsection (2) of this section.

(4) This chapter applies to conduct proscribed herein that affects Idaho commerce. [I.C., § 48-102, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-102, which comprised 1911, ch. 215, § 2, p. 689; reen. C.L. 107:2; C.S., § 2532; I.C.A., § 47-102, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to S.L. 2000, ch. 148 which is compiled as §§ 48-101 — 48-118.

#### **48-103. Definitions. —** As used in this act:

(1) "Idaho commerce" means any economic activity occurring wholly or partly within the state of Idaho, or which affects economic activity within the state of Idaho.

(2) "Person" means any natural person, corporation, partnership, trust, association, or any other legal or commercial entity. [I.C., § 48-103, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-103, which comprised 1911, ch. 215, § 3, p. 688; reen. C.L. 107:3; C.S., § 2533; I.C.A., § 47-103, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

For words "this act," see Compiler's notes, § 48-101.

**48-104. Unreasonable restraint of trade or commerce. —** A contract, combination, or conspiracy between two (2) or more persons in unreasonable restraint of Idaho commerce is unlawful. [I.C., § 48-104, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-104, which comprised 1911, ch. 215, § 4, p. 688; reen. C.L. 107:4; C.S., § 2534; I.C.A., § 47-104, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

**Sec. to sec. ref.** This section is referred to in § 48-108, 48-113.

**48-105. Monopolies. —** It is unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any line of Idaho commerce. [I.C., § 48-105, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-105, which comprised 1911, ch. 215, § 5, p. 688; reen. C.L. 107:5; C.S., § 2535; I.C.A., § 47-105, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

**Sec. to sec. ref.** This section is referred to in § 48-108, 48-113.

**48-106. Acquisitions that substantially lessen competition. —**

(1) It is unlawful for a person to acquire, directly or indirectly, the whole or any part of the stock, share capital, or other equity interest or the whole or any part of the assets of, another person engaged in Idaho commerce, where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly of any line of Idaho commerce.

(2) This section shall not apply to persons purchasing the stock or other equity interest of another person solely for investment and not using those assets by voting or otherwise to bring about, or attempt to bring about, the substantial lessening of competition. Nothing contained in this section shall prevent a person engaged in Idaho commerce from causing the formation of subsidiary corporations or other business organizations, or from owning and holding all or a part of the stock or equity interest of such subsidiary corporations or other business organizations. [I.C., § 48-106, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-106, which comprised 1911, ch. 215, § 6, p. 688; reen. C.L. 107:6; C.S., § 2536; I.C.A., § 47-106, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

**Sec. to sec. ref.** This section is referred to in § 48-108.

**48-107. Exempt activities. —** (1) No provision of this chapter shall be construed to prohibit:

(a) Activities that are exempt from the operation of the federal antitrust laws.

(b) Activities required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the agency with such power.

(c) Activities of a municipality or its officers or employees acting in an official capacity, to the extent that those activities are authorized or directed by state law.

(d) The existence of, or membership in, organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit; nor shall the provisions of this act forbid or restrain individual members of such organizations from lawfully carrying out legitimate objectives of the organization.

(e) Activities of any labor organization, individual members of the labor organization, or group of labor organizations, of any employer or group of employers, or of any groups of employees, if these activities are directed predominantly to labor objectives which are permitted under the laws of this state or of the United States.

(2) Persons engaged in the production of agricultural products may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing the products of these persons, to the extent permitted under the laws of this state or of the United States. These associations may have marketing agencies in common and such associations and their members may make the necessary contracts and agreements to effect such purposes. However, such



associations must conform to the requirements of chapter 26, title 22, Idaho Code. [I.C., § 48-107, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-107, which comprised 1911, ch. 215, § 7, p. 688; reen. C.L. 107:7; C.S., § 2537; I.C.A., § 47-107, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000. For words "this act," see Compiler's notes, § 48-101.

**48-108. Civil actions and settlements by the attorney general. —**

(1) Whenever the attorney general has reason to believe that any person is engaging, has engaged, or is about to engage in any act or practice declared unlawful by this chapter, the attorney general may bring an action in the name of the state against that person:

(a) To obtain a declaratory judgment that the act or practice violates the provisions of this chapter;

(b) To enjoin any act or practice that violates the provisions of this chapter by issuance of a temporary restraining order or preliminary or permanent injunction, without bond, upon the giving of appropriate notice;

(c) To recover on behalf of the state and its agencies actual damages or restitution;

(d) To recover civil penalties of up to fifty thousand dollars (\$50,000) per violation of section 48-104 or 48-105, Idaho Code, or any injunction, judgment or consent order issued or entered into pursuant to this chapter and reasonable expenses, investigative costs and attorney's fees; and

(e) To obtain an order requiring divestiture of any assets:

(i) Acquired in violation of section 48-106, Idaho Code, to the extent determined necessary by the district court to avoid the creation of a monopoly or any likely substantial lessening of competition resulting from such transaction found violative of section 48-106, Idaho Code; or

(ii) To restore competition in any line of Idaho commerce which has been eliminated by a violation of section 48-105, Idaho Code.

(2) The attorney general also may bring a civil action in the name of the state, as *parens patriae* on behalf of persons residing in this state, to secure monetary relief as provided under this chapter for injury directly or indirectly sustained by those persons because of any violation of section 48-104 or 48-105, Idaho Code, in accordance with the following provisions:

(a) The district court shall award the attorney general as monetary relief the total damages sustained for violations of section 48-104 or 48-105, Idaho Code, and the cost of suit, including a reasonable attorney's fee. The court shall increase any damage recovery to an amount not in excess of three (3) times the damages sustained if the court finds that the violation at issue constituted a *per se* violation of section 48-104, Idaho Code, or an intentional violation of section 48-105, Idaho Code. The court shall exclude from the amount of monetary relief awarded in such action any amount which duplicates amounts which have been awarded for the same injury already or which are allocable to persons who have excluded their claims pursuant to subsection (2)(c) of this section.

(b) In any action brought under this section, the attorney general shall, at such times, in such manner, and with such content as the district court may direct, cause notice of the *parens patriae* action to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court shall direct the attorney general to give such notice as may be required by due process of law.

(c) Any person on whose behalf an action is brought under this section may elect to exclude from such adjudication the portion of the attorney general's claim for monetary relief attributable to him by filing notice of such election with the court within the time period specified in the notice of such action given to the persons to be benefited by the action. Any person failing to give such notice shall be barred during the pendency of such action from commencing an action in his or her own name for the injury alleged in such action and the final judgment in such action shall be *res judicata* as to any claim which could be brought by such person under this act based on the facts alleged or proven in such action.

(d) All damages shall be distributed in such a manner that will afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

(3) In lieu of instigating or continuing an action or proceeding, or to conclude an investigation commenced or contemplated under section 48-109, Idaho Code, the attorney general may accept a consent decree with respect to any act or practice alleged to be a violation of this chapter. The consent decree may include a stipulation for the payment of civil penalties, the attorney general's reasonable expenses, investigative costs and attorney's fees, an agreement to pay damages or to allow for restitution of money, property or other things received in connection with a violation of this chapter, and agreed to injunctive provisions. Before any consent decree entered into pursuant to this section is effective, it must be approved by the district court and an entry made in the district court in the manner required for making an entry of judgment. If the consent decree submitted to the court is to settle an action brought under subsection (2) of this section, notice of the proposed settlement shall be given in such manner as the court directs. Once court approval is received, any breach of the conditions of the consent decree shall be treated as a violation of a court order, and shall be subject to all penalties provided by law for violation of court orders, including the penalties set forth in section 48-111, Idaho Code.

(4) The attorney general may proceed under any antitrust laws in the federal courts on behalf of this state or any of its political subdivisions or agencies. [I.C., § 48-108, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-108, which comprised 1911, ch. 215, § 8, p. 688; reen. C.L. 107:8; C.S., § 2538; I.C.A., § 47-108, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

For words "this act," see Compiler's notes, § 48-101.

The words "this chapter" refer to §§ 48-101 — 48-117.

**Sec. to sec. ref.** This section is referred to in § 48-111, 48-112, 48-114.



**48-109. Civil investigations.** — (1) Whenever the attorney general has reason to believe that a person is engaging or has engaged in any act or practice declared unlawful by this chapter, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to a civil investigation, a written civil investigative demand requiring that person to appear and give oral testimony, under oath, concerning documentary material or information, or to produce relevant documentary material or physical evidence for examination, at a reasonable time and place as may be stated in the investigative demand, or to furnish any combination thereof, concerning the conduct of any Idaho commerce that is the subject matter of the investigation. The return date of a civil investigative demand shall be not less than thirty (30) days after service of the demand.

(2) To accomplish the objectives and to carry out the duties prescribed by this chapter, the attorney general may also issue subpoenas to any person and conduct hearings in aid of any investigation or inquiry.

(3)(a) The scope of any civil investigative demand or subpoena shall be consistent with the scope of discovery as provided for by rule 26(b)(1), Idaho rules of civil procedure.

(b) Any person who is not the subject of investigation shall be reimbursed the reasonable expenses of complying with a civil investigative demand or subpoena.

(4) At any time before the return date specified in a civil investigative demand, or within thirty (30) days after the demand has been served, whichever period is later, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the district court of the county where the person served with the demand resides or has his principal place of business or in the district court in Ada county.

(5) Any person who in good faith complies with a subpoena or investigative demand issued under this section shall be immune from criminal or civil liability for such compliance, so long as such person has complied with any express contractual obligation to notify a third party of the civil investigative demand or subpoena.

(6) Except as provided in subsection (7) of this section, any procedure, testimony taken, or material produced under this section shall be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation unless confidentiality is waived by the person whose testimony is disclosed, or is waived by the person who produced to the attorney general or his designee the material being disclosed, or the disclosure is authorized by court order.

(7) The attorney general or his designee may disclose the testimony or material to a person who has a need to know such information and is employed by this state, the United States, or any other state, if, before disclosure, the receiving official agrees in writing to comply with the confidentiality provisions of this section and the attorney general or his designee has determined prior to making such disclosure that disclosure to the receiving person is reasonably necessary to permit proper enforcement of the antitrust laws of the United States or any state.

(8) The attorney general or his designee may exclude from the place of any examination under this section any person, except the person being examined and that person's counsel. [I.C., § 48-109, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-109, which comprised 1911, ch. 215, § 9, p. 688; reen. C.L. 107:9; C.S., § 2539; I.C.A., § 47-109, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

#### **48-110. Failure to obey civil investigative demand or subpoena.**

— (1) If any person fails or refuses to obey any subpoena or civil investigative demand issued by the attorney general, the attorney general may, after notice, apply to the district court and, after a hearing, request an order ordering the person to comply with the subpoena or civil investigative demand issued by the attorney general.

(2) The court shall award the prevailing party reasonable expenses and attorney's fees incurred in obtaining or resisting an order under this section if the court finds that the attorney general's request for an order under this section or a person's resistance to obeying any subpoena or investigative demand, was without a reasonable basis in fact or law.

(3) Disobedience of any order entered under the provisions of this section shall be treated as a violation of a court order, and subject the offending person to all penalties provided by law for violations of court orders, including the payment of civil penalties of not more than ten thousand dollars (\$10,000). [I.C., § 48-110, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-110, which comprised 1911, ch. 215, § 10, p. 688; compiled and reen. C.L. 107:10; C.S., § 2540; I.C.A., § 47-110, was repealed by S.L. 2000,

ch. 148, § 1, effective July 1, 2000.

**Sec. to sec. ref.** This section is referred to in § 48-114.

**48-111. Violation of court orders and consent decrees — Penalties.** — Any person who violates the terms of a consent order entered into pursuant to section 48-108, Idaho Code, or any other judgment or final order entered into under the provisions of this chapter, shall forfeit and pay a civil penalty of not more than fifty thousand dollars (\$50,000) for each violation, the amount of the penalty to be determined by the district court issuing the judgment or order, or approving the consent decree. [I.C., § 48-111, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-111, which comprised 1911, ch. 215, § 11, p. 688; reen. C.L. 107:11; C.S., § 2541; I.C.A., § 47-111, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

**Sec. to sec. ref.** This section is referred to in § 48-108, 48-114.

**48-112. Additional relief of district court authorized.** — When the state prevails in any action brought under section 48-108, Idaho Code, the court shall award reasonable costs and attorney's fees to the attorney general. In addition, the court may:



(1) Make orders or judgments as necessary to prevent the use or employment by a person of any act or practice declared unlawful by this act;

(2) Make orders or judgments as necessary to compensate persons for damages sustained or to provide for restitution to persons of money, property or other things received from persons in connection with a violation of this chapter;

(3) Appoint a receiver to oversee assets or order sequestration of assets whenever it appears that the defendant threatens or is about to remove, conceal or dispose of property to the damage of persons to whom restoration would be made under this section and assess the expenses of a master, receiver or escrow agent against the defendant; and

(4) Grant other appropriate relief. [I.C., § 48-112, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-112, which comprised 1911, ch. 215, § 12, p. 688; reen. C.L. 107:12; C.S., § 2542; I.C.A., § 47-112, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

For words "this act" see Compiler's note, § 48-101.

The words "this chapter" refer to §§ 48-101 — 48-118.

**48-113. Private causes of action.** — (1) Any person injured directly or threatened with direct injury by reason of anything prohibited by this chapter, may bring an action for injunctive relief, damages, and, as determined by the court, reasonable costs and attorney's fees. The court shall exclude from the amount of monetary relief awarded to a plaintiff under this section any amount which duplicates amounts allocable to any other actual or potential plaintiff including, without limitation, potential claims by the attorney general on behalf of indirect purchasers for the same conduct or injury.

(2) If the district court finds that the violation at issue constituted a per se violation of section 48-104, Idaho Code, or an intentional violation of section 48-105, Idaho Code, it shall increase the recovery to an amount not in excess of three (3) times the damages sustained. [I.C., § 48-113, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-113, which comprised 1911, ch. 215, § 13, p. 688; reen. C.L. 107:13; C.S., § 2543; I.C.A., § 47-113, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

**48-114. Awards to the attorney general — Use of moneys.** — All costs and fees recovered by the attorney general under the terms of this chapter shall be remitted to the consumer protection account. Such costs and fees deposited into the consumer protection account under this chapter shall be treated as interaccount receipts and may be expended pursuant to interaccount appropriation and shall be used for the furtherance of the attorney general's duties and activities under this chapter. All penalties recovered under section 48-108(1)(d), 48-110 or 48-111, Idaho Code, or actual damages or restitution recovered under section 48-108(1)(c), Idaho Code,

shall be remitted to the general fund. [I.C., § 48-114, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-114, which comprised 1911, ch. 215, § 14, p. 688; reen. C.L. 107:14; C.S., § 2544; I.C.A., § 47-114, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

**48-115. Statute of limitations.** — (1) Any action brought by the attorney general pursuant to this chapter is barred if it is not commenced within four (4) years after the cause of action accrues.

(2) Any other action brought pursuant to this chapter is barred if it is not commenced within four (4) years after the cause of action accrues, or within one (1) year after the conclusion of an action brought by the state pursuant to this chapter based in whole or in part on any matter complained of in the subsequent action, whichever is the latter.

(3) The foregoing statute of limitations shall be tolled during any period when the defendant in any action fraudulently concealed the events upon which the cause of action is based. [I.C., § 48-115, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-115, which comprised 1911, ch. 215, § 15, p. 688; reen. C.L. 107:15; C.S., § 2545; I.C.A., § 47-115, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

**48-116. Action not barred because it affects interstate or foreign commerce.** — No action under this chapter shall be barred on the ground that the activity or conduct complained of in any way affects or involves interstate or foreign commerce. [I.C., § 48-116, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-116, which comprised 1911, ch. 215, § 16, p. 688; reen. C.L. 107:16; C.S., § 2546; I.C.A., § 47-116, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.

**48-117. Service of notice.** — Service of any notice, civil investigative demand, or subpoena under this chapter shall be made personally within this state, but if personal service cannot be obtained, substituted service may be made by mailing service by registered or certified mail to the last known place of business, residence, or abode of the person within or without this state. [I.C., § 48-117, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-117, which comprised 1911, ch. 215, §§ 17, 18, p. 688; compiled and reen. C.L. 107:17; C.S., § 2547; I.C.A., § 47-117., was repealed by

S.L. 2000, ch. 148, § 1, effective July 1, 2000.

The words "this chapter" refer to §§ 48-101 — 48-118.



**48-118. Venue.** — Any action, application, or motion brought by the attorney general against a person under this chapter may be filed in the district court of the county in which the person resides or has his principal place of business, or with consent of the parties, may be brought in the district court of Ada county. If the person does not reside in or have a principal place of business in this state, the pleading may be brought in any district court in this state. [I.C., § 48-118, as added by 2000, ch. 148, § 3, p. 377.]

**Compiler's notes.** Former § 48-118, which comprised 1951, ch. 197, § 1, p. 421, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000. The words "this chapter" refer to §§ 48-101 — 48-118.

**48-119. Purpose of extension to distributors of publications.** [Repealed.]

**Compiler's notes.** This section, which comprised 1951, ch. 197, § 2, p. 421, was repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000.

CHAPTER 2

ANTI-PRICE DISCRIMINATION ACT

SECTION.	SECTION.
48-201. Definitions.	receipt of discrimination prohibited.
48-202. Discrimination unlawful — Differentials — Customer selection — Price changes — Rebutting prima facie case — Commissions or brokerages prohibited — Customer discrimination or	48-203. Cooperative associations exempt.
	48-204. Rights of persons injured by violations of act.
	48-205. Title of act.
	48-206. Separability.

**48-201. Definitions.** — The following terms for the purposes of this act are hereby defined as follows:

(a) "Person" means the plural as well as the singular and shall include an individual, partnership, association, a joint stock company, business trust and an incorporated as well as an unincorporated organization.

(b) The term "price" as used herein shall mean the net price to the buyer after deduction of all discounts, rebates or other price concessions paid or allowed by the seller.

(c) The term "commerce" means trade or commerce within this state. [1937, ch. 229, § 1, p. 406.]

**Insufficient Evidence.**

Where the plaintiff makers of promissory notes to the defendant oil company failed to prove by a preponderance of the evidence that the agreement between the parties, whereby the makers of the notes would provide their land to build a gas station and sell the oil company's gasoline products, was an illegal

tying arrangement or that the agreement substantially lessened competition or tended to create a monopoly in favor of the oil company, the Idaho Antitrust Law and the Idaho Anti-Price Discrimination Act were not applicable. Pollard Oil Co. v. Christensen, 103 Idaho 110, 645 P.2d 344 (1982).

**48-202. Discrimination unlawful — Differentials — Customer selection — Price changes — Rebutting prima facie case — Commissions or brokerages prohibited — Customer discrimination or receipt of discrimination prohibited.** — (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality or to discriminate in price between different sections, communities or cities or portions thereof or between different locations in such sections, communities, cities or portions thereof in this state, where the effect of such discriminations may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: and provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: and provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, in any suit or other proceeding in which any violation of this act may be at issue, that there has been discrimination in price, or in services or facilities furnished, or in payment for services or facilities to be rendered, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with such violation: provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price, or the payment for or furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, any thing of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise; provided, however, that in all such transactions of sale and purchase it shall be unlawful for either party to such transaction to pay or grant anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, to the other party to the transaction or to any agent, representative, or other intermediary therein, where such agent, representative, or other intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of the said other party to such transaction.



(d) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. [1937, ch. 229, § 2, p. 406.]

**Cross ref.** Discrimination and unfair competition in buying and selling dairy products, §§ 37-1001 — 37-1015.

Farm produce price discrimination, prevention of, §§ 22-1601 — 22-1606.

#### **Attorney Fees.**

The peculiar nature of a legal malpractice action requires the action to proceed as a suit within a suit; therefore, an award of attorney fees pursuant to the underlying antitrust action constitutes a part of the measure of damages in the malpractice case, and must be submitted as part of the proof of damages under the antitrust claim; it is not sufficient to file a post-trial affidavit of costs and fees under I.R.C.P. 54(d). *Fitzgerald v. Walker*, 121 Idaho 589, 826 P.2d 1301 (1992).

**Collateral References.** 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair

Trade Practices, §§ 70-89.

Right of manufacturer, producer, or wholesaler to control resale price. 7 A.L.R. 449; 19 A.L.R. 925; 32 A.L.R. 1087; 103 A.L.R. 1331; 125 A.L.R. 1335.

Reasonableness of prices fixed as affecting application of antitrust laws to combinations to maintain resale prices. 50 A.L.R. 1000.

State statutes validating contracts fixing resale prices, as a violation of Sherman Antitrust Act. 125 A.L.R. 1335.

Right to relief for violation of resale price agreement under fair trade act as affected by permitting or failing to prevent violations by dealers other than defendant. 163 A.L.R. 889.

Statutes prohibiting buyer or seller of commodities from fixing prices in one locality higher or lower than in another locality. 67 A.L.R.3d 26.

**48-203. Cooperative associations exempt.** — Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association. [1937, ch. 229, § 3, p. 406.]

**48-204. Rights of persons injured by violations of act.** — (a) Any person injured by any violation, or who will suffer injury from any threatened violation, of this act, may maintain an action, in any court of competent jurisdiction of this state, to prevent, restrain or enjoin such violation or threatened violation. If in such action, a violation or threatened violation of this act shall be established, the court shall enjoin and restrain or otherwise

prohibit such violation or threatened violation, and the plaintiff in said action shall be entitled to recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

(b) In the event no injunctive relief is sought or required, any person injured by any violation of this act, may maintain an action for damages alone in any court of competent jurisdiction in this state, and the measure of damages in such action shall be the same as that prescribed by subsection (a) of this section.

(c) In any proceedings instituted or action brought in pursuance of the provisions of subsections (a) and (b) of this section, the plaintiff, upon proof that he has been unlawfully discriminated against by the defendant, shall be conclusively presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination; and in addition thereto, may establish such further damages, if any, as he may have sustained as a result of such discrimination.

(d) Where a particular trade or industry of which the person, firm or corporation complained against is a member, has an established cost survey for the localities and vicinities in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

(e) Any contract, express or implied, made by any person in violation of any of the provisions of this act, is declared to be an illegal contract and no recovery thereon shall be had. [1937, ch. 229, § 4, p. 406.]

#### **Attorney Fees.**

The peculiar nature of a legal malpractice action requires the action to proceed as a suit within a suit; therefore, an award of attorney fees pursuant to the underlying antitrust action constitutes a part of the measure of

damages in the malpractice case, and must be submitted as part of the proof of damages under the antitrust claim; it is not sufficient to file a post-trial affidavit of costs and fees under I.R.C.P. 54(d). *Fitzgerald v. Walker*, 121 Idaho 589, 826 P.2d 1301 (1992).

**48-205. Title of act.** — This act shall be known and designated as the "Anti-Price Discrimination Act" and its inhibitions against discrimination shall embrace any scheme of special concessions or rebates, any collateral contracts or agreements or any device of any nature whereby discrimination is, in substance or fact, effected in violation of the spirit and intent of this act. [1937, ch. 229, § 5, p. 406.]

**48-206. Separability.** — If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. [1937, ch. 229, § 6, p. 406.]

**Compiler's notes.** Section 7 of S.L. 1937, ch. 229 repealed all laws and parts of laws in conflict therewith.



## CHAPTER 3

## FAIR TRADE ACT

## SECTION.

48-301 — 48-312. [Repealed.]

**48-301 — 48-312. Definitions — Contracts for minimum price — Evasion of price restrictions — Minimum resale prices — Resale at less than minimum price — Advertising — Limitation of quantity of items — Exceptions — Injunctive relief — Damages — Immunity — Penalty — Administration of act — Separability — Title of act. [Repealed.]**

**Compiler's notes.** The following sections were repealed by S.L. 2000, ch. 148, § 1, effective July 1, 2000:

48-301: 1937, ch. 240, § 1, p. 429.  
 48-302: 1937, ch. 240, § 2, p. 429.  
 48-303: 1937, ch. 240, § 3, p. 429.  
 48-304: 1937, ch. 240, § 4, p. 429.  
 48-305: 1937, ch. 240, § 5, p. 429.  
 48-306: 1937, ch. 240, § 6, p. 429.  
 48-306A: I.C., § 48-306A, as added by 1969, ch. 239, § 1, p. 755.  
 48-307: 1937, ch. 240, § 7, p. 429; am. 1955, ch. 94, § 3, p. 208.

48-308: I.C., § 48-308, as added by 1955, ch. 94, § 4, p. 208.

48-309: I.C., § 48-309, as added by 1955, ch. 94, § 5, p. 208.

48-310: I.C., § 48-310, as added by 1955, ch. 94, § 6, p. 208.

48-311: I.C., § 48-311, as added by 1955, ch. 94, § 7, p. 208.

48-312: I.C., § 48-312, as added by 1955, ch. 94, § 8, p. 208.

## CHAPTER 4

## UNFAIR SALES ACT

## SECTION.

48-401. Title of act.  
 48-402. Declaration of policy and purpose.  
 48-403. Definitions of terms.  
 48-404. Advertising or sales at less than cost contrary to public policy.  
 48-405. Penalty for advertising or selling merchandise at less than cost.  
 48-405A. Limitation of quantity of items offered for sale at retail prohibited.  
 48-406. Injunctions.

## SECTION.

48-407. Exempted sales.  
 48-408. Supervision and administration of act by governor.  
 48-409. Witnesses — Exemption from prosecution based upon testimony.  
 48-410. [Repealed.]  
 48-411. Separability.  
 48-412. Deceptive advertising as unfair competition.  
 48-413. Rebates unlawful.

**48-401. Title of act.** — This act shall be known and designated, and may be cited, as the "Unfair Sales Act." [1939, ch. 209, § 1, p. 427.]

**Compiler's notes.** The words "this act" refer to S.L. 1939, ch. 209, which is compiled herein as §§ 48-401 — 48-411.

**48-402. Declaration of policy and purpose.** — The practice of selling certain items of merchandise below cost in order to attract patronage is a deceptive form of advertising and an unfair method of competition. Such practice misleads the consumer, works back against the farmer, obstructs

commerce and diverts business from dealers who maintain a fair price policy, with the result of unemployment, underpayment of employees, excessive working hours, nonpayment of taxes and inevitable train of undesirable consequences including economic depression. This act is designed to make illegal such practice and to promote the general welfare of the state of Idaho. [1939, ch. 209, § 2, p. 427.]

**Compiler's notes.** For sections in which "this act" is compiled see Compiler's notes, § 48-401.

**Monopolies, Restraints of Trade, and Unfair Trade Practices,** §§ 239-242.

**Collateral References.** 54 Am. Jur. 2d,

87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 13.

**48-403. Definitions of terms.** — (a) When used in this act, the term "cost to the retailer" shall mean the actual cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer at the lowest prices then prevailing in his trade area, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three fourths ( $\frac{3}{4}$ ) of one per cent (1%) of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup in the absence of proof of a lesser cost, shall be six per cent (6%) of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) When used in this act, the term "cost to the wholesaler" shall mean the actual cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three fourths ( $\frac{3}{4}$ ) of one per cent (1%) of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be two per cent (2%) of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b)(aa) When used in this act, the term "cost to the direct seller" shall mean the actual cost of the merchandise to the direct seller or the replacement cost of the merchandise to the direct seller at the lowest price then prevailing in his trade area, whichever is the lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges not otherwise included in the invoice cost or the replacement cost to the merchandise as herein set forth, and



(2) cartage to the retail outlet if done or paid for by the direct seller, which cartage cost, in the absence of proof of a lesser cost shall be deemed to be one and one half [per cent] (1½%) of the cost to the direct seller as herein defined after adding thereto freight charges, but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost shall be eight per cent (8%) of the cost to the direct seller as herein set forth after adding thereto freight charges, but before adding thereto cartage and markup.

(c) When used in this act the term "replacement cost" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought at the nearest source of supply by the retailer, wholesaler or direct seller at any time within thirty (30) days prior to the date of sale or the date upon which it is offered for sale by the retailer, wholesaler or direct seller if bought in the same quantity or quantities as the retailer's, wholesaler's or direct seller's last purchase of the said merchandise.

(d) Where one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purpose of this act be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of subsections (a), (b) and (b-aa) of section 48-403 (this section) respectively.

(e) The terms "cost to the retailer" "cost to the wholesaler" and "cost to the direct seller" as defined in subsections (a), (b) and (b-aa) of this section shall mean bona fide costs; and purchases made by retailers, wholesalers and direct sellers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer, cost to the wholesaler and cost to the direct seller. Any manufacturer's published list price, less published discounts, in effect in this state at the time any such manufacturer's merchandise is purchased by a wholesaler, retailer or direct seller is deemed to be competent evidence of the cost of such manufacturer's merchandise, in the absence of proof of a lesser cost.

(f) The terms "sell at retail," "sales at retail" and "retail sale" shall mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(g) The term "sell at wholesale," "sales at wholesale" and "wholesale sales" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purpose of resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(h) The term "retailer" shall mean and include every person, partnership, corporation or association engaged in the business of making sales at retail

within this state; provided, that in case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sale at wholesale, such terms shall be applied only to the retail portion of such business.

(i) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state; provided that in case of a person, partnership, corporation or association engaged in the business of making both sales at wholesale and sales at retail, such term shall apply only to the wholesale portion of such business.

(j) The term "freight charges" when used in this act shall mean minimum rates or charges contained in the lawfully filed tariff of any carriers holding authority from the Idaho Public Utilities Commission of Idaho or the Interstate Commerce Commission which tariff is on file with the said Idaho Public Utilities Commission or the Interstate Commerce Commission.

(k) The term "direct seller" when used in this act shall mean and include every retailer as herein defined who buys processed merchandise direct from the processor for the purpose of selling such processed merchandise at retail, but a retailer shall be a direct seller only as to the processed merchandise so purchased.

(l) The term "store or outlet" as used in this act, means any place at which goods, wares or merchandise are sold or offered for sale to the public; provided, however, that the term "store or outlet" shall not be construed to include any place at which the gross sales of goods, wares or merchandise in the last preceding calendar year do not exceed \$5,000.

(m) The term "person" shall mean any individual, firm, partnership, corporation or association. [1939, ch. 209, § 3, p. 427; am. 1941, ch. 117, § 1, p. 230; am. 1955, ch. 95, § 2, p. 211; am. 1955, ch. 234, § 8, p. 521.]

**Compiler's notes.** The bracketed words "per cent" in subdivision (b)(aa)(2) were inserted by the compiler.

The words enclosed in parentheses so appeared in the law as enacted.

For sections in which "this act" is compiled see Compiler's notes, § 48-401.

Section 3 of S.L. 1955, ch. 95, is compiled as § 48-405.

Section 6 of S.L. 1955, ch. 234, is compiled as § 67-4705, § 7 has been repealed, and § 9 is compiled as § 48-410 (now repealed).

Section 1 of S.L. 1955, ch. 95 repealed §§ 48-406 and 48-408, Idaho Code.

**48-404. Advertising or sales at less than cost contrary to public policy.** — It is hereby declared that any advertising, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce. [1939, ch. 209, § 4, p. 427; am. 1941, ch. 117, § 2, p. 230.]



**Compiler's notes.** For sections in which "this act" is compiled see Compiler's notes, § 48-401.

**Collateral References.** Constitutionality and construction of statute validating contracts fixing resale prices, and giving right of action for violation of statute. 103 A.L.R.

1331; 125 A.L.R. 1335.

Constitutionality of statutes fixing prices of milk. 122 A.L.R. 1062.

Validity, construction, and application of state statutory provision prohibiting sales of commodities below cost — Modern cases. 41 A.L.R.4th 612.

**48-405. Penalty for advertising or selling merchandise at less than cost.** — Any retailer or direct seller who shall, in contravention of the policy of this act, advertise, offer to sell or sell at retail any item of merchandise, which is subject to this act, at less than cost to the retailer or direct seller as defined in this act, or knowingly buys any item of merchandise, which is subject to this act, from any wholesaler at less than cost to the wholesaler as herein defined, or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell or sell at wholesale any item of merchandise, which is subject to this act, at less than cost to the wholesaler as defined in this act, shall be guilty of a misdemeanor for each single offense, and upon conviction thereof shall be punished by a fine of not more than \$500 or by imprisonment not to exceed six (6) months or by both said fine and imprisonment, in the discretion of the court. Proof of any such advertising, offer to sell or sale by any retailer, direct seller or wholesaler in contravention of the policy of this act, shall be prima facie evidence of a violation of this act. [1939, ch. 209, § 5, p. 427; am. 1941, ch. 117, § 3, p. 230; am. 1955, ch. 95, § 3, p. 211.]

**Compiler's notes.** For sections in which "this act" is compiled see Compiler's notes, § 48-401.

Section 2 of S.L. 1955, ch. 95, is compiled as § 48-403.

**48-405A. Limitation of quantity of items offered for sale at retail prohibited.** — No person conducting a retail business, which involves the resale to consumers of commodities purchased or acquired for that purpose, may limit the quantity of any article or product sold or offered for sale to any one customer to a quantity less than the entire supply thereof owned or possessed by the seller or which he otherwise is authorized to sell. Any person as principal, agent, officer or director, by himself, or another person, who shall violate this section shall be guilty of a misdemeanor for each single violation and upon conviction thereof shall be punishable pursuant to the provisions of section 48-405, Idaho Code. [I.C., § 48-405A, as added by 1969, ch. 239, § 2, p. 755.]

**Compiler's notes.** Section 1 of S.L. 1969, ch. 239 is compiled as § 48-306A (now repealed).

#### **Wholesale Purchase.**

In appeal from conviction by defendant for refusing to sell entire stock of shotgun wads

to representative of a competitor who was going to purchase them for resale, court held that such a sale would have been a wholesale purchase, not retail, and as such was not prohibited by this section. *State v. Neufeld*, 95 Idaho 705, 518 P.2d 967 (1974).

**48-406. Injunctions.** — (1) **Parties Authorized To Bring.** Any person, municipal or other public corporation, or the state of Idaho may maintain an action to enjoin a continuance of any act or acts in violation of this act.

(2) **Authority to Issue.** If it appears to the court upon any application for a temporary injunction, or upon the hearing for any order to show cause why a temporary injunction should not be issued, or, if the court shall find, in any such action, that any defendant therein is violating, or has violated, this act, then the court shall enjoin the defendant from doing all acts which are prohibited in said act.

(3) **Restraints Which May Be Included.** The court may, in its discretion, include in any injunction against a violation of this act such other restraints as it may deem expedient in order to deter the defendant therefrom, and insure against his committing a future violation of this act.

(4) **Article or Products Covered.** Any injunction against a violation of this act, whether temporary or final, shall cover every article or product handled or sold by the defendant and not merely the particular article or product involved in the pending action.

(5) **Undertaking or Bond.** As a condition to the granting of a temporary injunction under this act, the court may require of the plaintiff, excepting when a municipal or public corporation or the state of Idaho is the plaintiff, a written undertaking in such sum as the court deems reasonable and proper in the premises, with sufficient sureties to the effect that the plaintiff will pay to the person enjoined such costs and damages, not exceeding an amount specified in said undertaking, as such person enjoined may incur or sustain by reason of the issuance of a temporary injunction, if it shall be finally decided that plaintiff was not entitled thereto.

Within five (5) days after the service of the temporary injunction, the defendant may except to the sufficiency of the sureties. If the defendant fails to do so he is deemed to have waived all objections to them.

When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two (2) nor more than five (5) days, must justify before the judge or a probate judge, in the same manner as upon bail or arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed the order granting an injunction shall be dissolved.

(6) **Injury and Damages.** In any action under this act, it is not necessary to allege or prove actual damages or threat thereof, or actual injury or threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action is entitled to recover the amount of the actual damages, if any, sustained by the plaintiff, as well as the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this act. [I.C., § 48-406, as added by 1955, ch. 95, § 4, p. 211.]

**Compiler's notes.** Former § 48-406 which comprised S.L. 1939, ch. 209, § 6, p. 427; am. 1941, ch. 117, § 4, p. 230; am. 1945, ch. 206, § 1, p. 387, was repealed by S.L. 1955, ch. 95, § 1, p. 211 and the present material substituted therefor.

Section 5 of S.L. 1955, ch. 95, is compiled as § 48-408.

**Sec. to sec. ref.** This section is referred to in §§ 48-412 and 48-413.

**48-407. Exempted sales.** — The provisions of this act shall not apply to sales at retail or sales at wholesale.



(a) where perishable merchandise must be sold promptly in order to forestall loss;

(b) where merchandise is imperfect or damaged [damaged] or is being discontinued and is advertised, marked or sold as such;

(c) where merchandise is sold upon the final liquidation of any business;

(d) where an endeavor is made in good faith to meet the prices of a competitor as herein defined selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade.

(e) where merchandise is sold on contract to departments of the government or governmental agencies;

(f) where merchandise is sold by any officer acting under the order or direction of any court;

(g) where in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product if advertised, marked and sold as such. Provided, however, that any retailer or wholesaler claiming the benefits of any of the exceptions hereinabove provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of such exceptions. [1939, ch. 209, § 7, p. 427; am. 1941, ch. 117, § 5, p. 230.]

**Compiler's notes.** The bracketed word "damaged" was inserted by the compiler.

For sections in which "this act" is compiled see Compiler's notes, § 48-401.

#### **48-408. Supervision and administration of act by governor. —**

(1) The governor of the state of Idaho shall have the responsibility for the supervision and administration of this act and he shall have the authority to designate any department of the state government to supervise and administer this act under his direction.

(2) The governor or the department designated by him to supervise and administer this act shall employ such employees as may be required to supervise and administer this act, whose duties shall be:

(a) To inspect and investigate the sales practices of all persons subject to this act;

(b) To investigate and ascertain violations of this act;

(c) To prosecute all violations of this act, either by injunction proceedings, criminal proceedings or both.

(d) To aid and assist the attorney general of the state of Idaho and the prosecuting attorneys of the various counties in the enforcement of this act.

(e) To collect such taxes as called for in this act.

(f) To perform such other duties in connection with this act as may be designated by the governor. [I.C., § 48-408, as added by 1955, ch. 95, § 5, p. 211.]

**Compiler's notes.** Former § 48-408 which comprised S.L. 1939, ch. 209, § 8, p. 427; am. 1941, ch. 117, § 6, p. 230; am. 1945, ch. 206,

§ 2, p. 387, was repealed by S.L. 1955, ch. 95, § 1, p. 211.

S.L. 1955, ch. 234, § 3 compiled as § 67-

4703, provided that the department of commerce and development [now division of tourism and industrial development] shall administer and supervise the provisions of this chapter.

Section 4 of S.L. 1955, ch. 95, is compiled as § 48-406.

Section 6 of S.L. 1955, ch. 95, is compiled as § 48-410 (now repealed).

**48-409. Witnesses — Exemption from prosecution based upon testimony.** — Any party of record to any civil action or proceeding instituted or brought pursuant to the provisions of this act may be required to testify in such proceeding and to produce books, papers, invoices, contracts, agreements and all material documents before the court in such proceedings, providing, however, that no person compelled under the provisions of this section to testify or produce evidence tending to incriminate him or expose him to public ignominy shall be prosecuted for any crime which such testimony or evidence tends to prove or to which the same relates. This section shall not exempt any person from prosecution for perjury. [1939, ch. 209, § 9, as added by 1941, ch. 117, § 7, p. 230.]

**Compiler's notes.** For sections in which "this act" is compiled see Compiler's notes, § 48-401.

**48-410. Levy and collection of Idaho development and publicity fund tax — Appropriation and disbursements. [Repealed.]**

**Compiler's notes.** This section which comprised S.L. 1939, ch. 209, § 10, as added by S.L. 1941, ch. 117, § 7, p. 230; am. 1955, ch. 95, § 6, p. 211; am. 1955, ch. 234, § 9, p. 521; am. 1961, ch. 150, § 1, p. 216 was repealed by S.L. 1978, ch. 181, § 1, effective on and after January 1, 1979.

Section 2 of S.L. 1978, ch. 181 read: "Any funds remaining in the Idaho development and publicity fund on the effective date of this act shall be transferred to the general account."

**48-411. Separability.** — If any section, sentence, clause or provision of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions. [1939, ch. 209, § 12, as added by 1941, ch. 117, § 7, p. 230.]

**Compiler's notes.** For sections in which "this act" is compiled see Compiler's notes, § 48-401.

This section is, in fact, a duplication of old § 8 of the 1939 act.

Section 13 of S.L. 1939, ch. 209, as added by

S.L. 1941, ch. 117, § 7 repealed all laws and parts of laws in conflict therewith.

Section 14 of S.L. 1939, ch. 209, as added by S.L. 1941, ch. 117, § 7, declared an emergency. Approved March 8, 1941.

**48-412. Deceptive advertising as unfair competition.** — It is hereby declared to be unlawful, unfair competition and an act or acts within the purview of section 48-406, Idaho Code, for any manufacturer, wholesaler or retailer to advertise for sale, offer for sale or sell any goods, wares or merchandise where the advertisement contains any assertion, representation or statement which is untrue, deceptive or misleading or falsely represents the kind, classification, grade of quality of the goods, wares or



merchandise so advertised. [I.C., § 48-412, as added by 1959, ch. 158, § 1, p. 379.]

**48-413. Rebates unlawful.** — The inhibition of this chapter against selling merchandise at less than cost and unfair competition contrary to public policy shall embrace any scheme of special rebates, collateral contracts or any device of any nature by and among wholesalers, retailers and direct sellers whereby such rebates or agreements are, in substance or fact, effected in violation of the spirit and intent of this chapter. It is hereby declared to be unlawful, unfair competition, and an act or acts within the purview of section 48-406, Idaho Code, for any wholesaler, retailer or direct seller to give or receive special rebates or be a party to any such agreements or devices. [I.C., § 48-413, as added by 1963, ch. 144, § 1, p. 419.]

## CHAPTER 5

### REGISTRATION AND PROTECTION OF TRADEMARKS

#### SECTION.

- 48-501. Definitions.
- 48-502. Registrability.
- 48-503. Application for registration.
- 48-504. Filing of applications.
- 48-505. Certificate of registration.
- 48-506. Duration and renewal.
- 48-507. Assignments, amendments, changes of name and other instruments.
- 48-508. Records.
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#### SECTION.

- 48-511. Fraudulent registration.
- 48-512. Infringement.
- 48-513. Injury to business reputation — Dilution.
- 48-514. Remedies.
- 48-515. Forum for actions regarding registration — Service on out-of-state registrants.
- 48-516. Common law rights.
- 48-517. Fees.
- 48-518. Time of taking effect — Repeal of prior acts — Intent of act.

**48-501. Definitions.** — Whenever used in this chapter:

- (1) "Abandoned" shall mean when either of the following occurs:
  - (a) When the use of the mark has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for two (2) consecutive years shall constitute prima facie evidence of abandonment.
  - (b) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.
- (2) "Applicant" shall mean the person filing an application for registration of a mark under this act, and the legal representatives, successors, or assigns of such person.
- (3) "Certification mark" shall mean any word, name, symbol or device or any combination thereof: (a) used by a person other than its owner, or (b) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter to certify regional or other origin, material, mode of manufacture, quality, accuracy or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.
- (4) "Collective mark" shall mean a trademark or service mark: (a) used by the members of a cooperative, an association, or other collective group or

organization; or (b) which such cooperative association or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, and includes marks indicating membership in a union, an association or other organization.

(5) "Dilution" shall mean the lessening of the capacity of registrant's mark to identify and distinguish goods or services, regardless of the presence or absence of: (a) competition between the parties, or (b) likelihood of confusion, mistake or deception.

(6) "Juristic person" shall mean a firm, partnership, corporation, limited liability company or partnership, union, association, or other organization capable of suing and being sued in a court of law.

(7) "Mark" shall mean any trademark, service mark, collective mark or certification mark entitled to registration under this act whether registered or not.

(8) "Person" shall mean the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of this act and includes a juristic person as well as a natural person.

(9) "Registrant" shall mean the person to whom the registration of a mark under this act is issued, and the legal representatives, successors or assigns of such person.

(10) "Service mark" shall mean any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the services of one (1) person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

(11) "Trademark" shall mean any word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods of such person, including a unique product, from those manufactured and sold by others, and to indicate the source of the goods, even if that source is unknown.

(12) "Trade name" shall mean any name used by a person to identify a business or vocation of such person.

(13) "Use" shall mean the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this act, a mark shall be deemed to be in use: (a) on goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state. [I.C., § 48-501, as added by 1996, ch. 404, § 2, p. 1336; am. 1999, ch. 168, § 2, p. 455.]



**Compiler's notes.** Former § 48-501, which comprised 1965, ch. 305, § 1, p. 809; am. 1984, ch. 56, § 1, p. 95, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996.

The words "this act" refer to S.L. 1996, ch. 404 which is compiled as §§ 48-501 — 48-518.

**Collateral References.** What constitutes "famous mark" for purposes of federal Trademark Dilution Act, 15 U.S.C. § 1125(c), which provides remedies for dilution of famous marks. 165 A.L.R. Fed. 625.

**48-502. Registrability.** — (1) In order to be registered, a mark must have some element of distinctiveness, arbitrariness or uniqueness, which may be inherent to the mark or acquired through extended usage and establishment of a reputation.

(2) A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

- (a) Consists of or comprises immoral, deceptive or scandalous matter; or
  - (b) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; or
  - (c) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof; or
  - (d) Consists of or comprises the name, signature or portrait identifying a particular living individual, except by the individual's written consent;
  - (e) Consists of a mark which: (i) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or (ii) when used on or in connection with the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them; or (iii) is primarily merely a surname, provided however, that nothing in this subsection shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state for the five (5) years before the date on which the claim of distinctiveness is made; or
  - (f) Consists of or comprises a mark which so resembles a mark registered in this state or a mark or trade name previously used by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake or to deceive.
- [I.C., § 48-502, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-502, am. 1984, ch. 56, § 2, p. 95, was repealed by which comprised 1965, ch. 305, § 2, p. 809; S.L. 1996, ch. 404, § 1, effective July 1, 1996.

**48-503. Application for registration.** — Subject to the limitations set forth in this act, any person who uses a mark may file in the office of the secretary of state, in a form prescribed by the secretary of state, an application for registration of that mark setting forth, but not limited to, the following information:

(1) The name and business address of the person applying for such registration; and, if a corporation, limited liability company or partnership, the state of domestication, and if a partnership, the names of the general partners, as specified by the secretary of state;

(2) The goods or services on or in connection with which the mark is used and the mode or manner in which the mark is used on or in connection with such goods or services and the class in which such goods or services fall;

(3) The date when the mark was first used anywhere and the date when it was first used in this state by the applicant or a predecessor in interest; and

(4) A statement that the applicant is the owner of the mark, that the mark is in use, and that, to the knowledge of the person verifying the application, no other person has registered, in this state, or has the right to use such mark either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause confusion, or to cause mistake, or to deceive.

The secretary of state may also require a statement as to whether an application to register the mark, or portions or a composite thereof, has been filed by the applicant or a predecessor in interest in the United States patent and trademark office; and, if so, the applicant shall provide full particulars with respect thereto including the filing date and serial number of each application, the status thereof and, if any application was finally refused registration or has otherwise not resulted in a registration, the reasons therefor.

The application shall be signed by the applicant or by a member of the firm or an officer of the corporation or association applying.

The application shall be accompanied by a drawing or one (1) specimen showing the mark as actually used, complying with such requirements as the secretary of state may specify.

The application shall be accompanied by the application fee payable to the secretary of state. [I.C., § 48-503, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-503, S.L. 1996, ch. 404, § 1, effective July 1, 1996, which comprised 1965, ch. 305, § 3, p. 809; For words "this act," see Compiler's notes, am. 1984, ch. 56, § 3, p. 95, was repealed by § 48-501.

**48-504. Filing of applications.** — (1) Upon the filing of an application for registration and payment of the application fee, the secretary of state may cause the application to be examined for conformity with this act.

(2) The applicant shall provide any additional pertinent information requested by the secretary of state including a description of a design mark and may make, or authorize the secretary of state to make, such amendments to the application as may be reasonably requested by the secretary of state or deemed by the applicant to be advisable to respond to any rejection or objection.

(3) The secretary of state may require the applicant to disclaim an unregistrable component of a mark otherwise registrable, and an applicant may voluntarily disclaim a component of a mark sought to be registered. No disclaimer shall prejudice or affect the applicant's or regis-



trant's rights then existing or thereafter arising in the disclaimed matter, or the applicant's or registrant's rights of registration on another application if the disclaimed matter is distinctive of the applicant's or registrant's goods or services.

(4) Amendments may be made by the secretary of state upon the application submitted by the applicant upon the applicant's agreement, or the secretary of state may require a fresh application.

(5) If the applicant is found not to be entitled to registration, the secretary of state shall advise the applicant thereof and of the reasons therefor. The applicant shall have a reasonable period of time specified by the secretary of state in which to reply or to amend the application, in which event the application shall then be reexamined. This procedure may be repeated until: (a) the secretary of state finally refuses registration of the mark; or (b) the applicant fails to reply or amend within the specified period, whereupon the application shall be deemed to have been abandoned.

(6) If the secretary of state finally refuses registration of the mark, the applicant may appeal the denial of such registration to the district court in and for Ada county. The court may compel registration of the mark, but without cost to the secretary of state, on proof that all the statements in the application are true and that the mark is otherwise entitled to registration.

(7) In the instance of applications concurrently being processed by the secretary of state which seek registration of the same or confusingly similar marks for the same or related goods or services, the secretary of state shall grant priority to the applications in order of filing. If a prior-filed application is granted a registration, the other application or applications shall then be rejected. Any rejected applicant may bring an action for cancellation of the registration upon grounds of prior or superior rights to the mark, in accordance with the provisions of section 48-509, Idaho Code. [I.C., § 48-504, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-504, which comprised 1965, ch. 305, § 4, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996. For words "this act," see Compiler's notes, § 48-501.

**48-505. Certificate of registration.** — Upon compliance by the applicant with the requirements of this act, the secretary of state shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the secretary of state and the seal of the state, and it shall show the name and business address and, for a corporation, limited liability company or partnership, the state of domestication, and if a partnership, the names of the general partners, as specified by the secretary of state, of the person claiming ownership of the mark, the date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in this state, the class of goods or services and a description of the goods or services on or in connection with which the mark is used, a reproduction of the mark, the registration date and the term of the registration.

Any certificate of registration issued by the secretary of state under the provisions hereof or a copy thereof duly certified by the secretary of state shall be admissible in evidence as competent and sufficient proof of the registration of such mark in any actions or judicial proceedings in any court of this state. [I.C., § 48-505, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-505, S.L. 1996, ch. 404, § 1, effective July 1, 1996, which comprised 1965, ch. 305, § 5, p. 809; For words "this act," see Compiler's notes, am. 1984, ch. 56, § 4, p. 95, was repealed by § 48-501.

**48-506. Duration and renewal.** — A registration of mark hereunder shall be effective for a term of ten (10) years from the date of registration and, upon application filed within six (6) months prior to the expiration of such term in a manner complying with the rules of the secretary of state, the registration may be renewed for a like term from the end of the expiring term. A renewal fee, payable to the secretary of state, shall accompany the application for renewal of the registration.

A registration may be renewed for successive periods of ten (10) years in like manner and the secretary of state shall issue a certificate of renewal.

Any registration in force on the date on which this act shall become effective [July 1, 1996] shall continue in full force and effect for the unexpired term thereof and may be renewed by filing an application for renewal with the secretary of state in compliance with the rules of the secretary of state upon payment of the renewal fee within six (6) months prior to the expiration of the registration.

All applications for renewal under this act, whether of registrations made under this act or of registrations effected under any prior act, shall include a statement that the mark has been and is still in use. [I.C., § 48-506, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-506, S.L. 1996, ch. 404, § 1, effective July 1, 1996, which comprised 1965, ch. 305, § 6, p. 809; For words "this act," see Compiler's notes, am. 1984, ch. 56, § 5, p. 95, was repealed by § 48-501.

**48-507. Assignments, amendments, changes of name and other instruments.** — (1) Any mark and its registration hereunder shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark. Assignment shall be by instruments in writing duly executed and may be filed with the secretary of state on a form provided by the secretary of state, upon the payment of the fee provided in section 48-517, Idaho Code, payable to the secretary of state who, upon filing of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this act shall be void as against any subsequent purchaser for valuable consideration without notice, unless it is filed with the secretary of state within three (3) months after the date thereof or prior to such subsequent purchase.

(2) Any registrant or applicant effecting a change of the name of the person to whom the mark was issued or for whom an application was filed



may file an application for amendment with the secretary of state upon the payment of the filing fee. The secretary of state may issue to the owner a certificate of amendment of registration for the remainder of the term of the registration or last renewal thereof.

(3) Other instruments which relate to a mark registered or application pending pursuant to this act, such as, by way of example, licenses, security interests or mortgages, may be filed in the discretion of the secretary of state pursuant to rule, provided that such instrument is in writing and duly executed.

(4) Acknowledgment shall be prima facie evidence of the execution of an assignment or other instrument and, when filed by the secretary of state, the record shall be prima facie evidence of execution.

(5) A photocopy of any instrument referred to in subsection (1), (2), or (3) of this section, shall be accepted for filing. [I.C., § 48-507, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-507, which comprised 1965, ch. 305, § 7, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996. For words "this act," see Compiler's notes, § 48-501.

**48-508. Records.** — The secretary of state shall keep for public examination a record of all marks registered or renewed under this act, as well as a record of all documents filed pursuant to section 48-507, Idaho Code, until disposed of in accordance with chapter 57, title 67, Idaho Code. [I.C., § 48-508, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-508, which comprised 1965, ch. 305, § 8, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996. For words "this act," see Compiler's notes, § 48-501.

**48-509. Cancellation.** — The secretary of state shall cancel from the register, in whole or in part:

(1) Any registration concerning which the secretary of state receives a voluntary request for cancellation from the registrant or the assignee of record;

(2) All registrations granted under this act and not renewed in accordance with the provisions of this chapter;

(3) Any registration concerning which a court of competent jurisdiction shall find that:

- (a) The registered mark has been abandoned;
- (b) The registrant is not the owner of the mark;
- (c) The registration was granted improperly;
- (d) The registration was obtained fraudulently;
- (e) The mark is or has become the generic name for the goods or services, or a portion thereof, for which it was registered;
- (f) The registered mark is so similar, as to be likely to cause confusion or mistake or to deceive, to a mark registered by another person in this state

prior to the date of the filing of the application for registration by the registrant hereunder, and not abandoned; or

(4) When a court of competent jurisdiction orders cancellation of a registration on any ground. [I.C., § 48-509, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-509, which comprised 1965, ch. 305, § 9, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996. For words "this act," see Compiler's notes, § 48-501.

**48-510. Classification.** — The secretary of state shall use the international classification of goods and services for convenience of administration of this act, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all goods upon which, or services with which, the mark is actually being used indicating the appropriate class or classes of goods or services. When a single application includes goods or services which fall within multiple classes, the secretary of state may require payment of a fee for each class. To the extent practicable, the classification of goods and services should conform to the classification adopted by the United States patent and trademark office. Applications for renewal shall be filed using the classification of goods and services in effect when the trademark was approved by the secretary of state; provided that a registrant may request a renewed registration to be issued under the international classification of goods and services. When such a request is made, the secretary of state shall issue the renewed certificate as requested by the registrant if such renewal would not extend the registrant's rights. [I.C., § 48-510, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-510, which comprised 1965, ch. 305, § 10, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996. For words "this act," see Compiler's notes, § 48-501.

**48-511. Fraudulent registration.** — Any person who shall for himself, or on behalf of any other person, procure the filing or registration of any mark in the office of the secretary of state under the provisions of this chapter, by knowingly making any false or fraudulent representation or declaration, orally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of such filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction. [I.C., § 48-511, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-511, which comprised 1965, ch. 305, § 11, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996.

**48-512. Infringement.** — Subject to the provisions of section 48-516, Idaho Code, any person who shall:



(1) Use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under this act in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) Reproduce, counterfeit, copy or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services, shall be liable in a civil action by the registrant for any and all of the remedies provided in section 48-514, Idaho Code, except that under this subsection the registrant shall not be entitled to recover profits or damages unless the acts have been committed with the intent to cause confusion or mistake or to deceive. [I.C., § 48-512, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-512, which comprised 1965, ch. 305, § 12, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996.

For words "this act," see Compiler's notes, § 48-501.

#### **Likelihood of Confusion.**

In an action by a veterinarian against a national pet store chain for trademark infringement related to the phrase, "Where Pets are Family," the court found no likelihood of confusion and, therefore, granted summary judgment to the pet store chain; although the parties indisputably sold related goods and services and the pet store chain's extensive advertising gave it the ability to overwhelm any public recognition and goodwill that the

veterinarian had developed in the mark, the court noted that both parties use the trademark merely as a tagline to their distinctive business names, that their marketing efforts were concentrated in different media, that there was no evidence of actual confusion, and reasonably attentive pet owners should be particularly attentive in selecting a veterinarian for their family pets and thus were likely to perceive the differences between a veterinary clinic and the pet store chain. *Cohn v. Petsmart, Inc.*, 281 F.3d 837 (9th Cir. 2002).

**Collateral References.** World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96 A.L.R.5th 1.

Parody as trademark or tradename dilution or infringement. 179 A.L.R. Fed. 181.

**48-513. Injury to business reputation — Dilution.** — The owner of a mark which is famous in this state shall be entitled, subject to the principles of equity, to an injunction against another's use of a mark, commencing after the owner's mark becomes famous, which causes dilution of the distinctive quality of the owner's mark, and to obtain such other relief as is provided in this section. In determining whether a mark is famous, a court may consider factors such as, but not limited to:

(1) The degree of inherent or acquired distinctiveness of the mark in this state;

(2) The duration and extent of use of the mark in connection with the goods and services;

(3) The duration and extent of advertising and publicity of the mark in this state;

(4) The geographical extent of the trading area in which the mark is used;

(5) The channels of trade for the goods or services with which the owner's mark is used;

(6) The degree of recognition of the owner's mark in its and in the other's trading areas and channels of trade in this state; and

(7) The nature and extent of use of the same or similar mark by third parties.

The owner shall be entitled only to injunctive relief in this state in an action brought under this section, unless the subsequent user willfully intended to trade on the owner's reputation or to cause dilution of the owner's mark. If such willful intent is proven, the owner shall also be entitled to the other remedies provided in this chapter, subject to the discretion of the court and the principles of equity. [I.C., § 48-513, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-513, which comprised 1965, ch. 305, § 13, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996.

What constitutes "famous mark" for purposes of federal Trademark Dilution Act, 15 U.S.C. § 1125(c), which provides remedies for dilution of famous marks. 165 A.L.R. Fed. 625.

**Collateral References.** World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96 A.L.R.5th 1.

**48-514. Remedies.** — Any owner of a mark registered under this act may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display or sale as may be by the court deemed just and reasonable, and may require the defendants to pay to such owner all profits derived from and all damages suffered by reason of such wrongful manufacture, use, display or sale. The court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in the case be delivered to an officer of the court, or to the complainant, to be destroyed. The court, in its discretion, may enter judgment for an amount not to exceed three (3) times such profits and damages and may award reasonable attorney's fees and costs of suit to the prevailing party in such cases where the court finds the other party committed the wrongful acts with knowledge or in bad faith or otherwise, as the circumstances of the case may warrant.

The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any criminal law of this state. [I.C., § 48-514, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** Former § 48-514, which comprised 1965, ch. 305, § 14, p. 809, was repealed by S.L. 1996, ch. 404, § 1, effective July 1, 1996.

For words "this act," see Compiler's notes, § 48-501.

**48-515. Forum for actions regarding registration — Service on out-of-state registrants.** — (1) Actions to require cancellation of a mark registered pursuant to this act or to appeal the denial of registration of a mark pursuant to this act shall be brought in the district court in and for Ada county. In an action to compel registration, the proceeding shall be based solely upon the record before the secretary of state. In an action for



cancellation, the secretary of state shall not be made a party to the proceeding but shall be notified of the filing of the complaint by the clerk of the court in which it is filed and shall be given the right to intervene in the action.

(2) In any action brought against a nonresident registrant, service may be effected upon the secretary of state as agent for service of the registrant in accordance with the procedures established for service upon nonresident corporations and business entities under the Idaho rules of civil procedure. [I.C., § 48-515, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 48-501.

**48-516. Common law rights.** — Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law. [I.C., § 48-516, as added by 1996, ch. 404, § 2, p. 1336.]

**48-517. Fees.** — The secretary of state shall charge thirty dollars (\$30.00) for the various applications and filing fees required in this chapter and for related services. The application fee payable herein shall be refunded if the registration for a mark is not granted. [I.C., § 48-517, as added by 1996, ch. 404, § 2, p. 1336; am. 1999, ch. 211, § 2, p. 562.]

**Compiler's notes.** Section 1 of S.L. 1999,  
ch. 211, is compiled as § 30-3-4.

**48-518. Time of taking effect — Repeal of prior acts — Intent of act.** — This act shall be in force and effect on July 1, 1996, but shall not affect any suit, proceeding or appeal then pending. All acts relating to marks and parts of any other acts inconsistent herewith are hereby repealed on the effective date [July 1, 1996] of this act, provided that as to any application, suit, proceeding or appeal, and for that purpose only, pending at the time this act takes effect the repeal shall be deemed not to be effective until final determination of said pending application, suit, proceeding or appeal.

The intent of this act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the trademark act of 1946, as amended. To that end, the construction given the federal act should be examined as persuasive authority for interpreting and construing this act. [I.C., § 48-518, as added by 1996, ch. 404, § 2, p. 1336.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 48-501.

## CHAPTER 6

## CONSUMER PROTECTION ACT

## SECTION.

- 48-601. Short title and purpose.
- 48-602. Definitions.
- 48-603. Unfair methods and practices.
- 48-603A. Unfair solicitation practices.
- 48-603B. Unfair tax return preparation practices.
- 48-603C. Unconscionable methods, acts or practices.
- 48-603D. Unfair telephone services — Unordered goods and services — Disclosure to consumers.
- 48-603E. Unfair bulk electronic mail advertisement practices.
- 48-604. Intent of legislature — Attorney general to make rules and regulations.
- 48-605. Exceptions to chapter.
- 48-606. Proceedings by attorney general.
- 48-607. Additional relief by court authorized.

## SECTION.

- 48-608. Loss from purchase or lease — Actual and punitive damages.
- 48-609. [Repealed.]
- 48-610. Voluntary compliance — District court approval.
- 48-611. Investigative demand by attorney general — Report required.
- 48-612. Additional powers of attorney general.
- 48-613. Service of notice.
- 48-614. Failure to obey attorney general — Application to district court.
- 48-615. Violation of injunction — Civil penalty.
- 48-616. Forfeiture of corporate franchise.
- 48-617. Local law enforcement officials — Duties.
- 48-618. Construction of chapter.
- 48-619. Limitation of action.

**48-601. Short title and purpose.** — This act shall be known and may be cited as the "Idaho consumer protection act". The purpose of this act is to protect both consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce, and to provide efficient and economical procedures to secure such protection. It is the intention of the legislature that this chapter be remedial and be so construed. [1971, ch. 181, § 2, p. 847; am. 1990, ch. 273, § 1, p. 766.]

**Compiler's notes.** Former chapter 48-6 which comprised S.L. 1965, ch. 293, §§ 1-6, was repealed by S.L. 1971, ch. 181, § 1.

The words "this act" refer to S.L. 1971, ch. 181 as amended compiled as §§ 48-601 — 48-619.

Section 2 of S.L. 1990, ch. 273 is compiled as § 48-603.

**Cross ref.** Chain or pyramid distributor schemes, prohibited, penalties, § 18-3101.

**Sec. to sec. ref.** This chapter is referred to in §§ 48-909, 48-1007, 48-1108, 48-1205, 49-1602, 49-1608, 49-1610, 54-2919, 54-4319.

**Cited in:** Irwin Rogers Ins. Agency, Inc. v. Murphy, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992); Wiggins v. Peachtree Settlement Fund-ing, 273 Bankr. 839 (Bankr. D. Idaho 2001).

## ANALYSIS

- Application.
- Collection of debts.
- In general.
- Instruction.
- Harmless error.
- Legislative intent.
- Medical malpractice.

Price negotiations.

Written sales presentation.

**Application.**

The Idaho Consumer Protection Act does not expressly include or exclude commercial transactions, and is applicable to protect the ultimate consumer of a product, who intends to use it in a for-profit business. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

**Collection of Debts.**

The collection of debts arising from sales of goods and services is subject to the provisions of the Idaho Consumer Protection Act. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

**In General.**

The Idaho Consumer Protection Act, §§ 48-601 to 48-619, prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce within the State of Idaho. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).



**Instruction.****—Harmless Error.**

Where, although the jury was not instructed under the Idaho Consumer Protection Act (ICPA), it was instructed regarding the common law fraud claims and the plaintiffs presented no sound basis for a jury to reach a different result under the ICPA, the court's refusal to present a claim under ICPA to the jury, even if error, constituted harmless error. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

**Legislative Intent.**

The intent of the legislature is that the Idaho Consumer Protection Act be liberally construed to effect the legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

**Medical Malpractice.**

Plaintiffs must proceed in a medical malpractice action under the negligence standard set forth in § 6-1012; therefore, the plaintiffs could not bring a cause of action under the Consumer Protection Act for the defendants' failure to provide adequate health care after holding themselves out as being knowledgeable and capable of providing adequate health care. *Keyser v. St. Mary's Hosp.*, 662 F. Supp. 191 (D. Idaho 1987).

**Price Negotiations.**

Where the testimony of 15 consumers and two salesmen for a water conditioner salesman indicated that no price negotiations or bargaining occurred during the sale of water conditioner units, and other evidence indicated that all the units sold in the state were sold at the same so-called special discount price, the evidence did not support the trial court's finding, in this action under the Consumer Protection Act, that the price of the water conditioners was subject to negotiation or bargaining. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

**Written Sales Presentation.**

Where in an action brought by the Attorney General under the Consumer Protection Act, 15 consumers testified that they purchased water conditioner units from salesmen who read verbatim from a written script prepared by the manufacturer or that the salesmen delivered what appeared to be a memorized sales presentation, and several salesmen testified that the written sales presentation was used in all their sales, the evidence did not support the trial court's finding that the complaints of the individual consumers who testified at the trial could not be correlated with all sales made by the defendants. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

**48-602. Definitions. — As used in this act:**

(1) "Person" means natural persons, corporations both foreign and domestic, trusts, partnerships both limited and general, incorporated or unincorporated associations, companies, trusts, business entities, and any other legal entity, or any other group associated in fact although not a legal entity or any agent, assignee, heir, employee, representative or servant thereof.

(2) "Trade" and "commerce" mean the advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state.

(3) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, audio and/or visual recording, mechanical, photographic, or electronic transcription or other tangible document or recording.

(4) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.

(5) "Appropriate trade premises," mean premises at which either the owner or seller normally carries on a business, or where goods are normally offered or exposed for sale in the course of a business carried on at those premises.

(6) "Goods" mean any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, including certificates or coupons exchangeable for such goods.

(7) "Services" mean work, labor or any other act or practice provided or performed by a seller to or on behalf of a consumer.

(8) "Actions or transactions permitted under laws administered by a regulatory body or officer" mean specific acts, practices or transactions authorized by a regulatory body or officer pursuant to a contract, rule or regulation, or other properly issued order, directive or resolution.

(9) "Regulatory body or officer" means any person or governmental entity with authority to act pursuant to state of Idaho or federal statute. [1971, ch. 181, § 3, p. 847; am. 1973, ch. 285, § 1, p. 601; am. 1993, ch. 102, § 1, p. 256.]

**Compiler's notes.** Former § 48-602 was repealed. See Compiler's notes, § 48-601.

For the words "this act" see § 48-601.

Section 2 of S.L. 1993, ch. 102 is compiled as § 48-603B.

**Cited in:** Myers v. A.O. Smith Harvestore Prods., Inc., 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

#### ANALYSIS

"Sale" as crucial event.  
Trade.

#### "Sale" As Crucial Event.

The collection of a debt arising out of a sale of goods or services is subject to the provisions of the Idaho Consumer Protection Act (the Act), even when the collection of the debt is by a third party who has purchased the debt from the seller; it is the sale that brings the

debt into existence that is the crucial event, and debts that do not arise out of the sale of goods and services subject to the provisions of the Act are not covered. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

#### Trade.

The company, which specialized in purchasing structured personal injury and other settlement payment streams for cash and then reselling the settlements or annuities for a profit, engaged in trade or commerce as provided under subsection (2) of this section, where the company attempted to purchase annuity payments for profit, and where the company advertised its product through use of television commercials. *Wiggins v. Peachtree Settlement Funding*, 273 Bankr. 839 (Bankr. D. Idaho 2001).

**48-603. Unfair methods and practices.** — The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, where a person knows, or in the exercise of due care should know, that he has in the past, or is:

- (1) Passing off goods or services as those of another;
- (2) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) Using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not



have or that a person has a sponsorship, approval, status, affiliation, connection, qualifications or license that he does not have;

(6) Representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) Advertising goods or services with intent not to sell them as advertised;

(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) Obtaining the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed;

(13) Failing to deliver to the consumer at the time of the consumer's signature a legible copy of the contract or of any other document which the seller or lender has required or requested the buyer to sign, and which he has signed, during or after the contract negotiation;

(14) Making false or misleading statements of fact concerning the age, extent of use, or mileage of any goods;

(15) Promising or offering to pay, credit or allow to any buyer or lessee, any compensation or reward in consideration of his giving to the seller or lessor the names of prospective purchasers or lessees, or otherwise aiding the seller or lessor in making a sale or lease to another person, if the earning of the rebate, discount or other value is contingent upon the occurrence of an event subsequent to the time the buyer or lessee agrees to buy or lease;

(16) Representing that services, replacements or repairs are needed if they are not needed, or providing services, replacements or repairs that are not needed;

(17) Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer;

(18) Engaging in any unconscionable method, act or practice in the conduct of trade or commerce, as provided in section 48-603C, Idaho Code, provided, however, that the provisions of this subsection shall not apply to a regulated lender as that term is defined in subsection (37) of section 28-41-301, Idaho Code;

(19) Taking advantage of a disaster or emergency declared by the governor under chapter 10, title 46, Idaho Code, or the president of the United States under the provisions of the disaster relief act of 1974, 42 U.S.C. section 5121 et seq., by selling or offering to sell to the ultimate consumer fuel or food, pharmaceuticals, or water for human consumption at an exorbitant or excessive price; provided however, this subsection shall apply only to the location and for the duration of the declaration of emergency. In determining whether a price is exorbitant or excessive, the

court shall take into consideration the facts and circumstances including, but not limited to:

(a) A comparison between the price paid by the alleged violator for the fuel, food, pharmaceuticals, or water and the price for which the alleged violator sold those same items to the ultimate consumer immediately before and after the period specified by the disaster or emergency declaration;

(b) Additional costs of doing business incurred by the alleged violator because of the disaster or emergency;

(c) The duration of the disaster or emergency declaration.

Notwithstanding anything to the contrary contained elsewhere in the act, no private cause of action exists under this subsection. [1971, ch. 181, § 4, p. 847; am. 1973, ch. 285, § 2, p. 601; am. 1990, ch. 273, § 2, p. 766; am. 2002, ch. 358, § 1, p. 1015; am. 2002, ch. 361, § 2, p. 1019.]

**Legislative Intent.** Section 1 of S.L. 2002, ch. 361 provides: "The Legislature finds that during emergencies or disasters, some persons may take unfair advantage of consumers by greatly increasing prices for essential goods and services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency or disaster results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited."

**Compiler's notes.** Former § 48-603 was repealed. See Compiler's notes, § 48-601.

This section was amended by two 2002 acts, ch. 358, § 1, effective July 1, 2002 and ch. 361, § 2, effective March 27, 2002 which appear to be compatible and have been compiled together.

The amendment by ch. 358, § 1, effective July 1, 2002, in subsection (19), inserted "to the ultimate consumer" following "by selling or offering to sell", substituted "pharmaceuticals" for "medicine" following "fuel or food"; added "In determining whether a price is exorbitant or excessive, the court shall take into consideration the facts and circumstances, including, but not limited to:"; added subsections 19(a), (b), (c); and added the last sentence.

The amendment by ch. 361, § 2, effective March 27, 2002, added the semicolon at the end of subsection (18) and added subsection (19).

Sections 1 and 3 of S.L. 1990, ch. 273 are compiled as §§ 48-601 and 48-603C, respectively.

**Cited in:** McNeil v. Gisler, 100 Idaho 693, 604 P.2d 707 (1979); Yellow Pine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983).

#### ANALYSIS

Contract or other document.

— Failure to deliver.

Goods.

Legislative intent.

Liability for sales program.

"Sale" as crucial event.

Tendency to deceive.

Trade names.

**Contract or Other Document.**

— **Failure to Deliver.**

Insurance company's failure to give insured a copy of a promissory note signed by insured did not violate the Consumer Protection Act (§§ 48-601 to 48-619); the debt underlying the promissory note arose from the purchase of insurance through an insurance agency which is a sale explicitly excluded from the Act's provisions (§ 48-605(3)). *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

**Goods.**

Although "goods" defined under the act include intangible property which could encompass money, it would take a strained construction of the act to be able to hold that the signing of a personal guarantee for a loan to a corporation was "purchase of goods." *Idaho First Nat'l Bank v. Wells*, 100 Idaho 256, 596 P.2d 429 (1979).

**Legislative Intent.**

The intent of the legislature is that the Idaho Consumer Protection Act be liberally construed to effect the legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

**Liability for Sales Program.**

Where Master Manufacturing Company created and furnished the sales program uti-



lized by Master Distributors in Idaho, participated in the hiring and training of Master Distributors' sales personnel, was involved on a nearly daily basis with the ongoing operation of the sales program in Idaho, and knowingly distributed its products in Idaho through Master Distributors, Inc., Master Manufacturing Company was subject to liability under the Idaho Consumer Protection Act for any unfair or deceptive practices utilized in the Idaho sales program. State ex rel. Kidwell v. Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980).

#### **"Sale" as Crucial Event.**

The collection of a debt arising out of a sale of goods or services is subject to the provisions of the Idaho Consumer Protection Act (the Act), even when the collection of the debt is by a third party who has purchased the debt from the seller; it is the sale that brings the debt into existence that is the crucial event, and debts that do not arise out of the sale of goods and services subject to the provisions of the Act are not covered. Western Acceptance Corp. v. Jones, 117 Idaho 399, 788 P.2d 214 (1990).

**48-603A. Unfair solicitation practices.** — (1) It is unlawful for any person to solicit a sale or order for sale of goods or services at other than appropriate trade premises, in person or by means of telephone, without clearly, affirmatively and expressly revealing at the time the person initially contacts the prospective buyer, and before making any other statement, except a greeting, or asking the prospective buyer any other questions, that the purpose of the contact is to effect a sale, by doing all of the following:

- (a) Stating the identity of the person making the solicitation;
- (b) Stating the trade-name of the person represented by the person making the solicitation;
- (c) Stating the kind of goods or services being offered for sale;
- (d) And, in the case of an "in person" contact, the person making the solicitation shall, in addition to meeting the requirements of paragraphs (a), (b) and (c) of this section, show or display identification which states the information required by paragraphs (a) and (b) of this section as well as the address of the place of business of one (1) of such persons so identified.

(2) It is unlawful for any person, in soliciting a sale or order for the sale of goods or services at other than his appropriate trade premises, in person or by telephone, to use any plan, scheme, or ruse which misrepresents his true status or mission for the purpose of making such sale or order for the sale of goods or services.

(3) It is unlawful in the sale or offering for sale of goods or services for any person conducting a mail order or catalog business in this state and utilizing a post office box address to fail to disclose the legal name under which business is done and the complete street address from which business is actually conducted in all advertising and promotional materials, including

#### **Tendency to Deceive.**

An act or practice is unfair if it is shown to possess a tendency or capacity to deceive consumers, and neither proof of an intention to deceive nor any actual damage to the public need be shown in order to establish a trade practice as unfair or deceptive. State ex rel. Kidwell v. Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980).

#### **Trade Names.**

The unauthorized advertising, display and/or sale by defendant of merchandise bearing plaintiffs' "private label" trade-names and/or trade-marks constituted unfair and deceptive trade practices in violation of this section. J.C. Penney Co. v. Parrish Co., 339 F. Supp. 726 (D. Idaho 1972).

**Collateral References.** 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1182-1198.

World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96 A.L.R.5th 1.

order blanks and forms. [I. C., § 48-603A, as added by 1973, ch. 285, § 3, p. 601.]

**Sec. to sec. ref.** This section is referred to in § 48-1003.

**48-603B. Unfair tax return preparation practices.** — (1) As used in this section, unless the context otherwise requires:

(a) "Tax preparer" means a person who, for a fee, engages in the business of assisting with, or preparing, federal, state, or local government income tax returns.

(b) "Fee" means any moneys or valuable consideration paid or promised to be paid for services rendered or to be rendered by any person or persons functioning as or conducting the business of a tax preparer.

(2) The following acts or omissions related to the conduct of the business of the tax preparer, which are done by the tax preparer or any employee, partner, officer, or member of the tax preparer are unlawful:

(a) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading.

(b) Causing or allowing a consumer to sign any document in blank relating to a tax return thereof.

(c) Failing or refusing to give to a consumer a copy of any document requiring his signature, as soon as the consumer signs such document.

(d) Failing to maintain a copy of any tax return prepared for a consumer for the applicable statute of limitation period on federal tax returns and state tax returns.

(e) Making false promises of a character likely to influence, persuade, or induce a consumer to authorize the tax preparation service.

(3)(a) It is unlawful for any person, including an individual, firm, corporation, association, partnership, joint venture, or any employee or agent therefor, to use or disclose any information obtained in the business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns unless such use or disclosure is within any of the following:

(i) Consented to in writing by the taxpayer in a separate document.

(ii) Expressly authorized by state or federal law.

(iii) Necessary to the preparation of the return.

(iv) Pursuant to court order.

(b) For the purposes of this section, a person is engaged in the business of preparing federal or state income tax returns or assisting taxpayers in preparing such returns if he does either of the following:

(i) Advertises, or gives publicity to the effect that he prepares or assists others in the preparation of state or federal income tax returns.

(ii) Prepares or assists others in the preparation of state or federal income tax returns for compensation.

(4)(a) It is unlawful for any person, including any individual, association, partnership, joint venture, or any employee or agent therefor, to fail to sign any state income tax return, or to fail to include his name, address, and social security number or preparer identification number issued



under 26 U.S.C. 6109 on any state income tax return, which he prepares for another for compensation, or which he assists another in the preparation of for compensation.

(b) It is unlawful for any corporation to fail to include its name and address on any state income tax return which it prepares for another for compensation, or which it assists another in the preparation of for compensation.

(5) A person who renders mere mechanical assistance in the preparation of a return, declaration, statement, or other document is not considered, for the purposes of this section, as preparing the return, declaration, statement or other document. [I.C., § 48-603B, as added by 1973, ch. 285, § 4, p. 601; am. 1993, ch. 102, § 2, p. 256; am. 2000, ch. 26, § 2, p. 45.]

**Compiler's notes.** Sections 1 and 3 of S.L. 1993, ch. 102 are compiled as §§ 48-602 and 48-606, respectively.

Sections 1 and 3 of S.L. 2000, ch. 26, are compiled as §§ 47-1203 and 63-3022A, respectively.

Section 8 of S.L. 2000, ch. 26 declared an emergency retroactively to January 1, 2000 and approved March 3, 2000.

**48-603C. Unconscionable methods, acts or practices.** — (1) Any unconscionable method, act or practice in the conduct of any trade or commerce violates the provisions of this chapter whether it occurs before, during, or after the conduct of the trade or commerce.

(2) In determining whether a method, act or practice is unconscionable, the following circumstances shall be taken into consideration by the court:

(a) Whether the alleged violator knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement or similar factor;

(b) Whether, at the time the consumer transaction was entered into, the alleged violator knew or had reason to know that the price grossly exceeded the price at which similar goods or services were readily available in similar transactions by similar persons, although price alone is insufficient to prove an unconscionable method, act or practice;

(c) Whether the alleged violator knowingly or with reason to know, induced the consumer to enter into a transaction that was excessively one-sided in favor of the alleged violator;

(d) Whether the sales conduct or pattern of sales conduct would outrage or offend the public conscience, as determined by the court. [I.C., § 48-603C, as added by 1990, ch. 273, § 3, p. 766.]

**Compiler's notes.** Sections 2 and 4 of S.L. 1990, ch. 273 are compiled as §§ 48-603 and 48-606, respectively.

**Sec. to sec. ref.** This section is referred to in § 48-603.

**Cited in:** *Wiggins v. Peachtree Settlement Funding*, 273 Bankr. 839 (Bankr. D. Idaho 2001).

**48-603D. Unfair telephone services — Unordered goods and services — Disclosure to consumers.** — (1) As used in this section:

(a) "Telecommunications provider" means a person that provides telecommunications service.

(b) "Telecommunications service" means the offering for sale of the conveyance of voice, data or other information at any frequency over any part of the electromagnetic spectrum. Telecommunications service does not include cable television service or broadcast service.

(c) "Telecommunications service agreement" means a contract between the telecommunications provider and a consumer for telecommunications service that is provided to the consumer on a continuing or periodic basis. The term includes an oral, written, or electronically recorded contract, and includes any material amendment to an existing contract.

(2)(a) Section 48-605, Idaho Code, notwithstanding, it is unlawful for a telecommunications provider to request a change in a consumer's local exchange or interexchange carrier without the consumer's verified consent.

(b) For purposes of subsection (2)(a) of this section:

(i) It is the responsibility of the telecommunications provider requesting a change in a telephone service subscriber's local exchange or interexchange carrier to verify that the consumer has authorized the change. A telecommunications provider that does not verify a consumer's change in his or her local exchange or interexchange carrier in accordance with the verification procedures, if any, adopted by the federal communications commission under the telecommunications act of 1996, including subpart K of 47 CFR 64, as those procedures are from time to time amended, commits an unlawful practice within the meaning of this act. A telephone company, wireless carrier or telecommunications carrier providing local exchange service who has been requested by another telecommunications provider to process a change in a consumer's carrier is only liable under this section if it knowingly participates in processing a requested change that is unauthorized or not properly verified; and

(ii) Compliance with applicable federal verification procedures is a complete defense to an allegation of consumer fraud under subsection (2)(a) of this section.

(3)(a) Section 48-605, Idaho Code, notwithstanding, it is unlawful for a telecommunications provider to bill a consumer for goods or services that are in addition to the consumer's telecommunications services without the consumer's authorization adding the goods or services to the consumer's service order.

(b) For purposes of subsection (3)(a) of this section, a telephone company or telecommunications carrier providing billing services for another telecommunications provider is only liable under this section if it knowingly participates in billing a consumer for goods or services without the consumer's authorization for the addition of those goods or services to the consumer's service order.

(4)(a) A telecommunications provider shall be solely responsible for providing written notice to a consumer who has agreed to enter into a telecommunications service agreement with the telecommunications provider.



(b) The notice shall clearly and conspicuously disclose to the consumer that the consumer's local exchange or interexchange carrier has been changed. The notice shall also advise the consumer that the consumer may change back to the previous carrier or select a new carrier by calling the previous carrier or the consumer's preferred carrier. The notice shall also provide the consumer with a toll-free number to call for further information.

(c) The notice shall be sent on or before the fifteenth day after the consumer enters into the telecommunications service agreement, or on or before the day the telecommunications provider first bills the consumer under the agreement, whichever is later.

(d) The notice must be a separate document sent for the sole purpose of advising the consumer of his or her entering into a telecommunications service agreement. The notice shall also not be combined with any sweepstakes entry form in the same document or other like inducement.

(e) The sending of this notice shall not constitute a defense to a charge that a consumer did not consent to enter into a telecommunications service agreement or that the consumer's consent was verified according to federal law.

(f) Compliance with the notification requirements, if any, adopted by the federal communications commission under the telecommunications act of 1996, including subpart K of 47 CFR 64, shall be deemed to be compliance with this subsection.

(g) A consumer who selects a different carrier within three (3) days after receiving the notice under subsection (4)(a) of this section may not be charged a cancellation charge or disconnect fee unless the consumer has more than five (5) telephone lines and has entered into a written agreement which specifies such charges and fees, and the telecommunications provider has complied with the verification procedures under subsection (2)(b) of this section. [I.C., § 48-603D, as added by 1998, ch. 274, § 1, p. 904.]

**Compiler's notes.** Section 2 of S.L. 1998, ch. 274 declared an emergency. Approved March 24, 1998.

#### **48-603E. Unfair bulk electronic mail advertisement practices. —**

(1) For purposes of this section, unless the context otherwise requires:

(a) "Bulk electronic mail advertisement" means an electronic message, containing the same or similar advertisement, which is contemporaneously transmitted to two (2) or more recipients, pursuant to an internet or intranet computer network.

(b) "Computer network" means a set of related, remotely connected devices and communication facilities, including two (2) or more computers, with the capability to transmit data among them through communication facilities.

(c) "Interactive computer service" means an information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or

system that provides access to the internet, and such systems operated or services offered by a library or an educational institution.

(d) "Recipient" means a person who receives any bulk electronic mail advertisements.

(2) Any person who uses an interactive computer service to initiate or cause the sending or transmittal of any bulk electronic mail advertisement shall provide an electronic mail address readily identifiable in the bulk electronic mail advertisement to which the recipient may send a request for declining such mail.

(3) It is unlawful for a person to use an interactive computer service to initiate or cause the sending or transmittal of any bulk electronic mail advertisement to any recipient that the sender knows, or has reason to know, engages in any of the following:

(a) Uses the name of a fictitious name of a third party in the return address field without the permission of the third party.

(b) Misrepresents any information in identifying the point of origin of the transmission path of the bulk electronic mail advertisement.

(c) Fails to contain information identifying the point of origin of the transmission path of the bulk electronic mail advertisement.

(d) Sends or transmits, at any time after five (5) business days of a declination, any bulk electronic mail advertisement to a recipient who provided the sender with a request declining the receipt of such advertisements.

(4) Pursuant to section 48-608, Idaho Code, a recipient that receives a bulk electronic mail advertisement in violation of this section may bring an action to recover actual damages. The recipient, in lieu of actual damages, may elect to recover from the person transmitting or causing to be transmitted such bulk electronic mail advertisement the greater of one hundred dollars (\$100) for each bulk electronic mail advertisement transmitted to the recipient in violation of this section or one thousand dollars (\$1,000).

(5) This section does not apply to any of the following:

(a) A person, including an interactive computer service, who provides users with access to a computer network, and as part of that service, transmits electronic mail on behalf of those users, unless such person transmits bulk electronic mail advertisements on behalf of those users which the person knows, or should have known, were transmitted in violation of this section.

(b) Electronic mail advertisements which are accessed by the recipient from an electronic bulletin board.

(c) A person who provides users with access at no charge to electronic mail, including receiving and transmitting bulk electronic mail advertisements, and, as a condition of providing such access, requires such users to receive unsolicited advertisements.

(d) The transmission of bulk electronic mail advertisements from an organization or similar entity to the members of such organization.

(6) An interactive computer service is not liable under this section for an action voluntarily taken in good faith to block or prevent the receipt or transmission through its service of any bulk electronic mail advertisement



which is reasonably believed to be in violation of this section. [I.C., § 48-603E, as added by 2000, ch. 423, § 1, p. 1373.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 423, provided that the act shall be in full force and effect on and after July 1, 2000.

**Collateral References.** World wide web domain as violating state trademark protection statute or state unfair trade practices act. 96 A.L.R.5th 1.

Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution. 98 A.L.R.5th 167.

**48-604. Intent of legislature — Attorney general to make rules and regulations.** — (1) It is the intent of the legislature that in construing this act due consideration and great weight shall be given to the interpretation of the federal trade commission and the federal courts relating to section 5(a)(1) of the federal trade commission act (15 U.S.C. 45(a)(1)), as from time to time amended; and

(2) The attorney general may make rules and regulations interpreting the provisions of this act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of section 5(a)(1) of the federal trade commission act (15 U.S.C. 45(a)(1)), as from time to time amended. Rules and regulations shall be promulgated as provided in chapter 52, title 67, Idaho Code. [1971, ch. 181, § 5, p. 847; am. 1973, ch. 285, § 5, p. 601.]

**Compiler's notes.** Former § 48-604 was repealed. See Compiler's notes, § 48-601.

For the words "this act" see § 48-601.

Section 6 of S.L. 1973, ch. 285 is compiled as § 48-604.

**Cited in:** Idaho First Nat'l Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979); Haskin v. Glass, 102 Idaho 785, 640 P.2d 1186 (Ct. App. 1982); Myers v. A.O. Smith Harvestore Prods., Inc., 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

#### **Federal Law.**

Federal case law as it has developed under § 5(2)(1) of the Federal Trade Commission Act, although not binding, is persuasive in application of the Idaho Consumer Protection Act, §§ 48-601 to 48-619. State ex rel. Kidwell v. Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980).

**48-605. Exceptions to chapter.** — Nothing in this act shall apply to:

(1) Actions or transactions permitted under laws administered by the state public utility commission or other regulatory body or officer acting under statutory authority of this state or the United States.

(2) Acts done by publishers, broadcasters, printers, retailers, or their employees, in the publication or dissemination of an advertisement in good faith on the basis of information or material supplied by others and without knowledge or reason to know of the misleading or deceptive character of such advertisement or the information or material furnished.

(3) Persons subject to chapter 13, title 41, Idaho Code (sections 41-1301 through 41-1327), defining, and providing for the determination by the director of the department of insurance of unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. [1971, ch. 181, § 6, p. 847.]

**Compiler's notes.** Former § 48-605 was repealed. See Compiler's notes, § 48-601.

For the words "this act" see § 48-601.

The name of the commissioner of insurance has been changed to the director of the department of insurance on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 11, § 3 (§ 41-203).

**Sec. to sec. ref.** This section is referred to in § 48-603D.

#### **Insurance.**

Insurance company's failure to give insured a copy of a promissory note signed by insured did not violate the Consumer Protection Act (§§ 48-601 to 48-619); the debt underlying the promissory note arose from the purchase of insurance through an insurance agency which is a sale explicitly excluded from the act's provisions. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 833 P.2d 128 (Ct. App. 1992).

**48-606. Proceedings by attorney general.** — (1) Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by this chapter to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state against such person:

- (a) To obtain a declaratory judgment that a method, act or practice violates the provisions of this chapter;
- (b) To enjoin any method, act or practice that violates the provisions of this chapter by issuance of a temporary restraining order or preliminary or permanent injunction, upon the giving of appropriate notice to that person as provided by the Idaho rules of civil procedure;
- (c) To recover on behalf of consumers actual damages or restitution of money, property or other things received from such consumers in connection with a violation of the provisions of this chapter;
- (d) To order specific performance by the violator;
- (e) To recover from the alleged violator civil penalties of up to five thousand dollars (\$5,000) per violation for violation of the provisions of this chapter; and
- (f) To recover from the alleged violator reasonable expenses, investigative costs and attorney's fees incurred by the attorney general.

(2) The action may be brought in the district court of the county in which such person resides or has his principal place of business, or with consent of the parties, may be brought in the district court of Ada county. If the person does not reside in or have a principal place of business in this state, the action may be brought in any district court in this state. The said courts are authorized to issue temporary restraining orders or preliminary or permanent injunctions to restrain and prevent violations of the provisions of this chapter, and such injunctions shall be issued without bond.

(3) Unless the attorney general finds in writing that the purposes of this chapter will be substantially and materially impaired by delay in instituting legal proceedings, he shall, before initiating any legal proceedings as provided in this section, give notice in writing that such proceedings are contemplated to the person against whom proceedings are contemplated and allow such person a reasonable opportunity to appear before the attorney general and execute an assurance of voluntary compliance or a consent judgment as in this chapter provided.



(4) In lieu of instigating or continuing an action or proceeding, the attorney general may accept a consent judgment with respect to any act or practice alleged to be a violation of the provisions of this chapter, and it may include a stipulation for the payment by such person of reasonable expenses, investigative costs and attorney's fees incurred by the attorney general. The consent judgment may also include a stipulation for civil penalties to be paid, not in excess of five thousand dollars (\$5,000) per alleged violation; a stipulation to pay to consumers actual damages or to allow for restitution of money, property or other things received from such consumers in connection with a violation of the provisions of this chapter; and/or a stipulation for specific performance. Before any consent judgment entered into pursuant to this section shall be effective, it must be approved by the district court and an entry made thereof in the manner required for making an entry of judgment. Once such approval is received, any breach of the conditions of such consent judgment shall be treated as a violation of a court order, and shall be subject to all penalties provided by law therefor, including the penalties set forth in section 48-615, Idaho Code.

(5) All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection fund which is hereby created in the state treasury. Moneys in the fund may be expended pursuant to legislative appropriation and shall be used for the furtherance of the attorney general's duties and activities under this chapter. At the beginning of each fiscal year, those moneys in the consumer protection fund which exceed the current year's appropriation plus any residual encumbrances made against prior years' appropriations by fifty percent (50%) or more shall be transferred to the general fund.

(6) Any moneys collected by the attorney general as trustee for distributions to injured consumers shall be deposited in the state treasury until such time as payment is made to an individual or individuals for purposes of restitution or pursuant to a court approved cy pres distribution. [1971, ch. 181, § 7, p. 847; am. 1973, ch. 285, § 6, p. 601; am. 1990, ch. 273, § 4, p. 766; am. 1991, ch. 243, § 1, p. 529; am. 1993, ch. 102, § 3, p. 256; am. 2001, ch. 61, § 1, p. 922.]

**Compiler's notes.** Former § 48-606 was repealed. See Compiler's notes, § 48-601.

Section 5 of S.L. 1973, ch. 285 is compiled as § 48-604.

Section 3 of S.L. 1990, ch. 273 is compiled as § 48-603C.

Section 2 of S.L. 1991, ch. 243 is compiled as § 48-612.

Sections 2 and 4 of S.L. 1993, ch. 102 are compiled as §§ 48-603B and 48-611, respectively.

Section 2 of S.L. 2001, ch. 61, is compiled as § 67-1401.

**Sec. to sec. ref.** This section is referred to in §§ 48-608, 48-610 and 48-614 — 48-616.

#### **Notice of Proceedings.**

Where the trial court testimony indicated that the manufacturer of water conditioning

units was kept informed about the complaints raised by the Attorney General's office and the proceedings leading up to the execution of the assurance of voluntary compliance by the distributor of those units, and that the manufacturer approved changes made in the sales presentation script pursuant to the assurance, the Attorney General's written notice to the distributor of the water conditioning units was adequate notice, under subsection (2) of this section, to the manufacturer that legal proceedings under the Idaho Consumer Protection Act (§§ 48-601 to 48-619) were contemplated as a result of the sales program in which the manufacturer was involved. State ex rel. Kidwell v. Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980).

**48-607. Additional relief by court authorized.** — In any action brought by the attorney general, wherein the state prevails, the court shall, in addition to the relief granted pursuant to section 48-606, Idaho Code, award reasonable costs, investigative expenses and attorney's fees to the attorney general. These costs and fees shall be remitted to the consumer protection account created in section 48-606, Idaho Code, and shall be used for the furtherance of the attorney general's duties and activities under this chapter. In addition, the court may:

(1) Make such orders or judgments as may be necessary to prevent the use or employment by a person of any method, act or practice declared to be a violation of the provisions of this chapter;

(2) Make such orders or judgments as may be necessary to compensate any consumers for actual damages sustained or to provide for restitution to any consumers of money, property or other things received from such consumers in connection with a violation of the provisions of this chapter;

(3) Make such orders or judgments as may be necessary to carry out a transaction in accordance with consumers' reasonable expectations;

(4) Appoint a master, receiver or escrow agent to oversee assets or order sequestration of assets whenever it shall appear that the defendant threatens or is about to remove, conceal or dispose of property to the damage of persons to whom restoration would be made under this subsection and assess the expenses of a master, receiver or escrow agent against the defendant;

(5) Revoke any license or certificate authorizing that person to engage in business in this state;

(6) Enjoin any person from engaging in business in this state; and/or

(7) Grant other appropriate relief. [1971, ch. 181, § 8, p. 847; am. 1973, ch. 285, § 7, p. 601; am. 1990, ch. 273, § 5, p. 766.]

**Cited in:** Yellow Pine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983).

#### ANALYSIS

Burden of proof.

Discretion of court.

Interested consumers.

Restitution.

#### Burden of Proof.

The State need not prove in a consumer protection action that consumers in fact relied upon deceptions or misrepresentations made by the defendant and that the defendant's acts were a proximate cause of the defendant's acquisition of moneys from consumers in order for the state to obtain restitutionary relief for Idaho consumers. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

#### Discretion of Court.

Restitution is not an automatic or mandatory remedy for violations of the Idaho Consumer Protection Act (§§ 48-601 to 48-619); the district court's discretion to award

restitutionary relief should be exercised with a view toward the purposes of the act. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

#### Interested Consumers.

An order granting consumers restitutionary relief or permitting them to rescind their purchase agreements with a water conditioner distributor may be applied to all consumers affected by the same trade practices found by the court to be unfair or deceptive under the act, since equitable relief need not be limited to the consumer witnesses who testified at trial. *State ex rel. Kidwell v. Master Distrib., Inc.*, 101 Idaho 447, 615 P.2d 116 (1980).

#### Restitution.

Restitutionary relief is appropriate in an action brought by the Attorney General under the Idaho Consumer Protection Act (§§ 48-601 to 48-619) where such relief would be required to reestablish the status quo ante which existed prior to the defendant's deceptive or unfair acts. *State ex rel. Kidwell v.*



Master Distrib., Inc., 101 Idaho 447, 615 P.2d 116 (1980).

**48-608. Loss from purchase or lease — Actual and punitive damages.** — (1) Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages or one thousand dollars (\$1,000), whichever is the greater; provided, however, that in the case of a class action, the class may bring an action for actual damages or a total for the class that may not exceed one thousand dollars (\$1,000), whichever is the greater. Any such person or class may also seek restitution, an order enjoining the use or employment of methods, acts or practices declared unlawful under this chapter and any other appropriate relief which the court in its discretion may deem just and necessary. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper in cases of repeated or flagrant violations.

(2) An action brought under subsection (1) of this section may be brought in the county in which the person against whom it is brought resides, has his principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred.

(3) Upon commencement of any action brought under this section, the clerk of the court shall, for informational purposes only, mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(4) Costs shall be allowed to the prevailing party unless the court otherwise directs. In any action brought by a person under this section, the court shall award, in addition to the relief provided in this section, reasonable attorney's fees to the plaintiff if he prevails. The court in its discretion may award attorney's fees to a prevailing defendant if it finds that the plaintiff's action is spurious or brought for harassment purposes only.

(5) Any permanent injunction, judgment or order of the court made under section 48-606(1) through (3) or section 48-607, Idaho Code, shall be admissible as evidence in an action brought under section 48-608, Idaho Code [this section], that the respondent used or employed a method, act or practice declared unlawful by this chapter. [1971, ch. 181, § 9, p. 847; am. 1973, ch. 285, § 8, p. 601; am. 1990, ch. 273, § 6, p. 766.]

**Compiler's notes.** The bracketed words "this section" in subsection (5) were inserted by the compiler.

For the words "this act" see § 48-601.

Section 9 of S.L. 1973, ch. 285 is compiled as § 48-610.

Section 7 of S.L. 1990, ch. 273 is compiled as § 48-610.

**Sec. to sec. ref.** This section is referred to in § 48-603E.

**Cited in:** Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 102 Idaho 744, 639 P.2d 442 (1981); Wiggins v. Peachtree Settlement Funding, 273 Bankr. 839 (Bankr. D. Idaho 2001).

#### ANALYSIS

Application.  
Basis for cause of actions.  
Damages.

Discretion of court.

Goods.

Payment of legal obligation.

Prevailing party.

—Attorney's fees.

Repeated or flagrant violations.

Standard of proof.

### Application.

In the 1990 Session Laws the legislature modified subsection (1) of this section in part by deleting the reference to the rules of civil procedure. No reason is indicated for the change. The Supreme Court of Idaho concluded that the rules still apply and that the modification was not intended to be removed from the rules actions pursued under subsection (1) of this section. *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 815 P.2d 461 (Ct. App. 1991).

### Basis for Cause of Actions.

The language of subsection (1) of this section does not require that a purchase or lease be "completed" in order for an action to be brought; however, since no authority exists for applying the Idaho Consumer Protection Act (§ 48-601 et seq.) to a merely contemplated transaction, a claim under the ICPA involving the sale of property must be based upon a sales contract. *Haskin v. Glass*, 102 Idaho 785, 640 P.2d 1186 (Ct. App. 1982).

### Damages.

Lessees of a gas station could not be awarded either actual or statutory damages for station owner's supplying lessees with a different brand of gasoline without notifying them of the difference, where lessees failed to prove any ascertainable losses arising from owner's deceptive trade practices. *Jackson v. Wood*, 859 P.2d 378 (Ct. App. 1993).

### Discretion of Court.

The determination of who is a prevailing party, for the purpose of receiving an award of attorney fees, is committed to the sound discretion of the trial court; that determination will not be disturbed unless an abuse of discretion has occurred. Where the trial court has exercised its discretion after a careful consideration of the relevant factual circumstances and principles of law, and without arbitrary disregard for those facts and principles of justice, that exercise of discretion has not been abused and will not be disturbed. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

### Goods.

Although "goods" defined under the act include intangible property which could encompass money, it would take a strained construction of the act to be able to hold that the signing of a personal guarantee for a loan to a corporation was "purchase of goods." Idaho

*First Nat'l Bank v. Wells*, 100 Idaho 256, 596 P.2d 429 (1979).

### Payment of Legal Obligation.

When a consumer merely pays an existing legal obligation, he does not suffer damages although there may be involved deceptive acts or practices. *Yellow Pine Water User's Ass'n v. Imel*, 105 Idaho 349, 670 P.2d 54 (1983).

Where consumers had paid no amount exceeding their admitted legal obligation to water authority, they had not suffered "ascertainable loss" such as would entitle them to recovery damages under this section. *Yellow Pine Water User's Ass'n v. Imel*, 105 Idaho 349, 670 P.2d 54 (1983).

### Prevailing Party.

In action by homeowners against seller of hydronic heating systems, trial court did not abuse its discretion in determining that homeowners were the prevailing parties despite the fact that majority of homeowners' claims were dismissed, that jury awarded damages amounting to only 3% of the recovery sought, and that seller prevailed on counterclaim against builder. *Decker v. Homeguard Sys.*, 105 Idaho 158, 666 P.2d 1169 (Ct. App. 1983).

The trial court did not err in determining that the plaintiffs had to suffer "ascertainable damages" under subsection (1) of this section before they could be considered prevailing parties and awarded attorney fees under subsection (3) [now subsection (4)] of this section. *Shurtliff v. Northwest Pools, Inc.*, 120 Idaho 263, 815 P.2d 461 (Ct. App. 1991).

### —Attorney's Fees.

The amount to be awarded as attorney's fees under subsection (3) (now subsection (4)) of this section was properly identified as a matter of discretion; however, the trial court improperly exercised its discretion in calculating the amount of fees on the basis of prevailing "theories" and the concomitant fractionating of the contingent fee. *Nalen v. Jenkins*, 113 Idaho 69, 741 P.2d 366 (Ct. App. 1987).

The intent of subsection (3) (now subsection (4)) of this section is to compensate a prevailing plaintiff for the costs of bringing an action under the Consumer Protection Act, and to further that purpose, attorney fees should be allowed on appeal for the prevailing plaintiff. *Nalen v. Jenkins*, 113 Idaho 69, 741 P.2d 366 (Ct. App. 1987).

The fact that an award is made to a party does not necessarily require the amount to be limited to the party-attorney agreement; the statute provides for the award of an objectively "reasonable" fee, and such a fee may be higher or lower than what the party must pay to the attorney under their agreement. *Nalen*



v. Jenkins, 114 Idaho 973, 763 P.2d 1081 (Ct. App. 1988).

**Repeated or Flagrant Violations.**

In a suit by distributor against manufacturer, testimony of four ex-distributors from the same time frame and geographical area was relevant to show repeated or flagrant violations of the Idaho Consumer Protection Act. *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 879 P.2d 1126 (1994).

**Standard of Proof.**

This section is remedial in nature; when a

party brings an action for violation of the Idaho Consumer Protection Act (ICPA), that party does not have to show an extreme deviation from reasonable standards of conduct in order to be awarded punitive damages, but rather must show repeated or flagrant violations of the ICPA. This section contains its own remedies; the only standard the jury must follow is that prescribed in the Act itself, i.e., repeated or flagrant violations. *Mac Tools, Inc. v. Griffin*, 126 Idaho 193, 879 P.2d 1126 (1994).

**48-609. Contract for sale or lease — Evidence of indebtedness — Assignment. [Repealed.]**

**Compiler's notes.** This section which comprised S.L. 1971, ch. 181, § 10, p. 847, was repealed by S.L. 1980, ch. 112, § 1.

**48-610. Voluntary compliance — District court approval.** — (1) In the administration of this chapter, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the provisions of this chapter from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the district court of the county in which the alleged violator resides or had his principal place of business or of the district court of Ada County and shall be deemed an order of the court enforceable by contempt proceedings.

(2) Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose.

(3) The assurance of voluntary compliance shall provide for the discontinuance by the person entering into the same of any method, act or practice alleged to be a violation of this chapter, and it may include a stipulation for the payment by such person of reasonable expenses, investigative costs and attorney's fees incurred by the attorney general. The recovered expenses, costs and fees shall be remitted to the consumer protection account created in section 48-606, Idaho Code, and shall be used for the furtherance of the attorney general's duties and activities under this chapter. The assurance may also include: a stipulation for payment to consumers of actual damages or for restitution of money, property, or other things received from consumers in connection with a violation of the provisions of this chapter; and a stipulation for specific performance.

(4) A violation of such assurance of voluntary compliance shall prima facie establish that the person subject thereto knows, or in the exercise of due care should know, that he has in the past violated or is violating the provisions of this chapter.

(5) Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to section

48-606, Idaho Code. [1971, ch. 181, § 11, p. 847; am. 1973, ch. 285, § 9, p. 601; am. 1990, ch. 273, § 7, p. 766.]

**Compiler's notes.** Section 8 of S.L. 1973, ch. 285 is compiled herein as § 48-608.

Sections 6 and 8 of S.L. 1990, ch. 273 are

compiled as §§ 48-608 and 48-612, respectively.

**48-611. Investigative demand by attorney general — Report required.** — (1) When the attorney general has reason to believe that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation. The return date in said investigative demand shall be not less than twenty (20) days after serving of the demand.

(2) At any time before the return date specified in an investigative demand, or within twenty (20) days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the district court of the county where the person served with the demand resides or has his principal place of business or in the district court in Ada County. [1971, ch. 181, § 12, p. 847; am. 1993, ch. 102, § 4, p. 256.]

**Compiler's notes.** For the words "this act" see § 48-601.

Sections 3 and 5 of S.L. 1993, ch. 102 are compiled as §§ 48-606 and 48-614, respectively.

#### ANALYSIS

Extent of attorney general's power.  
Signature of deputy acceptable.  
Waiver of right to object.

#### Extent of Attorney General's Power.

An investigative demand does not constitute an unqualified power of the attorney general to require the presentation of the information sought. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

#### Signature of Deputy Acceptable.

The attorney general is not required personally to sign an investigative demand issued by his office pursuant to this section, as it may be signed by a deputy attorney general. *Western Acceptance Corp. v. Jones*, 117 Idaho 399, 788 P.2d 214 (1990).

#### Waiver of Right to Object.

Failure to respond or file a petition pursuant to the procedures and within the time period set forth in this section constitutes a waiver of the right to object to the investigative demand. *State ex rel. Lance v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 929 P.2d 741 (1996).

**48-612. Additional powers of attorney general.** — To accomplish the objectives and to carry out the duties prescribed by this chapter, the attorney general, in addition to other powers conferred upon him by this chapter, may issue subpoenas to any person and conduct hearings in aid of



any investigation or inquiry; provided that information obtained pursuant to the powers conferred in this chapter shall be subject to disclosure according to chapter 3, title 9, Idaho Code. [1971, ch. 181, § 13, p. 847; am. 1990, ch. 213, § 67, p. 535; am. 1990, ch. 273, § 8, p. 766; am. 1991, ch. 243, § 2.]

**Compiler's notes.** This section was also amended by S.L. 1990, ch. 213, § 67 to become effective July 1, 1993. However, § 3 of S.L. 1991, ch. 243 repealed § 67, S.L. 1990, ch. 213, effective July 1, 1993.

Sections 66 and 68 of S.L. 1990, ch. 213 are compiled as §§ 47-1515 and 48-801, respectively.

Sections 7 and 9 of S.L. 1990, ch. 273 are compiled as §§ 48-610 and 48-614, respectively.

Section 1 of S.L. 1991, ch. 243 is compiled as § 48-606, § 3 contained a repeal and § 4 is compiled as § 48-614.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**48-613. Service of notice.** — Service of any notice, demand or subpoena under this act shall be made personally within this state, but if such cannot be obtained, substituted service therefor may be made in the following manner:

- (1) Personal service thereof without this state; or
- (2) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this state or such person for whom the same is intended; or
- (3) As to any person other than a natural person, in the manner provided in the Idaho rules of civil procedure as if a complaint which institutes a civil proceeding had been filed. [1971, ch. 181, § 14, p. 847.]

**Compiler's notes.** For the words "this act" see § 48-601.

**48-614. Failure to obey attorney general — Application to district court.** — (1) If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a district court of the county in which the person resides or has a principal place of business, or if the person does not reside in or have a principal place of business in this state, the attorney general may apply to any district court in this state and, after hearing thereon, request an order:

- (a) Ordering such person to file such statement or report, or to comply with the subpoena or investigative demand issued by the attorney general;
  - (b) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation; and
  - (c) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.
- (2) The court shall award the prevailing party reasonable expenses and attorney fees incurred in obtaining an order under the provisions of this section if the court finds that the attorney general's request for an order

under this section or a person's resistance to filing any statement or report, or obeying any subpoena or investigative demand, was without a reasonable basis in fact or law.

(3) Any disobedience of any final order entered under the provisions of this section by any court shall be punished as a contempt thereof. Contempt penalties sued for and recovered by the attorney general shall be remitted to the consumer protection account created in section 48-606, Idaho Code, and shall be used for the furtherance of the attorney general's duties and activities under the provisions of this chapter. [1971, ch. 181, § 15, p. 847; am. 1990, ch. 273, § 9, p. 766; am. 1991, ch. 243, § 4, p. 592; am. 1993, ch. 102, § 5, p. 256.]

**Compiler's notes.** Section 8 of S.L. 1990, ch. 273 is compiled as § 48-612.

Section 2 of S.L. 1991, ch. 243 is compiled as § 48-612 and § 3 contained a repeal.

Section 4 of S.L. 1993, ch. 102 is compiled as § 48-611.

Section 5 of S.L. 1991, ch. 243 read: "An emergency existing therefor, which emergency is hereby declared to exist, Section 2 of this act shall be in full force and effect on and after its passage and approval. Section 3 of this act shall be in full force and effect on and after July 1, 1993. Sections 1 and 4 of this act shall be in full force and effect on and after

July 1, 1991." Approved April 4, 1991.

#### **Failure to Object or Respond.**

Because the Consumer Protection Act sets forth a clear procedure and time limit for objecting to an investigative demand, the defendant's failure to object or respond to the investigative demand within the statutory time period was without a reasonable basis in fact or law. Since the state clearly prevailed on appeal, the state was awarded costs and attorney fees. *State ex rel. Lance v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 929 P.2d 741 (1996).

**48-615. Violation of injunction — Civil penalty.** — Any person who violates the terms of an injunction issued or consent order entered into pursuant to section 48-606, Idaho Code, or an order entered into pursuant to section 48-614, Idaho Code, shall forfeit and pay to the state a civil penalty of not more than ten thousand dollars (\$10,000) per violation, the amount of the penalty to be determined by the district court issuing the injunction. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of civil penalties. Said civil penalties sued for and recovered by the attorney general shall be remitted to the consumer protection account created in section 48-606, Idaho Code, and shall be used for the furtherance of the attorney general's duties and activities under the provisions of this chapter. [1971, ch. 181, § 16, p. 847; am. 1990, ch. 273, § 10, p. 766; am. 1993, ch. 102, § 6, p. 256.]

**Compiler's notes.** Section 11 of S.L. 1990, ch. 273 is compiled as § 48-617.

**Sec. to sec. ref.** This section is referred to in § 48-606.

**48-616. Forfeiture of corporate franchise.** — Upon petition by the attorney general, the district court of the county in which the principal place of business of the corporation is located may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under section 48-606, Idaho Code. [1971, ch. 181, § 17, p. 847; am. 1993, ch. 102, § 7, p. 256.]



**48-617. Local law enforcement officials — Duties.** — It shall be the duty of local law enforcement officials to provide the attorney general such assistance as the attorney general may request in the investigation, commencement and prosecution of actions pursuant to this chapter. [1971, ch. 181, § 18, p. 847; am. 1990, ch. 273, § 11, p. 766.]

**Compiler's notes.** Section 10 of S.L. 1990, ch. 273 is compiled as § 48-615.

**48-618. Construction of chapter.** — This act is to be construed uniformly with federal law and regulations. In any action instituted under this act it shall be an absolute defense to show the challenged practices are subject to and comply with statutes administrated by the federal trade commission, or any duties, regulations or decisions interpreting such statutes. [1971, ch. 181, § 18, p. 847.]

**Compiler's notes.** For the words "this act" see § 48-601.

**48-619. Limitation of action.** — No private action may be brought under this act more than two (2) years after the cause of action accrues. [1971, ch. 181, § 20, p. 847; am. 1997, ch. 127, § 1, p. 380.]

**Compiler's notes.** For the words "this act" see § 48-601.

Section 21 of S.L. 1971, ch. 181, read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for

any reason, such declaration shall not affect the validity of the remaining portions of this act."

Section 22 of S.L. 1971, ch. 181 declared an emergency. Approved March 24, 1971.

Section 2 of S.L. 1997, ch. 127 declared an emergency. Approved March 15, 1997.

## CHAPTER 7

### SHOPLIFTING

#### SECTION.

48-701. Liability for removing or concealing merchandise — Retail theft.

48-702. Liability for acts of minors.

#### SECTION.

48-703. Definitions.

48-704. Authorized actions of merchants.

48-705. Notice of right of detention.

**48-701. Liability for removing or concealing merchandise — Retail theft.** — Any person who knowingly removes merchandise from a merchant's premises without paying therefor, or knowingly conceals merchandise to avoid paying therefor, or knowingly commits retail theft, shall be civilly liable to the merchant for the retail value of the merchandise, plus damages of not less than one hundred dollars (\$100) nor more than two hundred fifty dollars (\$250), costs of suit and reasonable attorneys' fees. [I.C., § 48-701, as added by 1974, ch. 245, § 1, p. 1620; am. 1980, ch. 243, § 1, p. 562.]

**Cross ref.** Detention of shoplifting suspects, defense to civil and criminal liability, § 18-4626.

**Collateral References.** 52A C.J.S., Larceny, § 1.

Actionability of accusation or imputation of

shoplifting. 29 A.L.R.3d 961.

Changing the price tags by patron in self-service store as criminal offense. 60 A.L.R.3d 1293.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense. 64 A.L.R.4th 1088.

**48-702. Liability for acts of minors.** — The parent or legal guardian, having legal custody, of a minor who knowingly removes merchandise from a merchant's premises without paying therefor, or knowingly conceals merchandise to avoid paying therefor, or knowingly commits retail theft, shall be civilly liable to the merchant for the retail value of the merchandise, plus damages of not less than one hundred dollars (\$100) nor more than two hundred fifty dollars (\$250), costs of suit and reasonable attorneys' fees. Recovery under this section is not limited by any other provision of law which limits the liability of a parent or legal guardian for the tortious conduct of a minor. The liability of parents or legal guardian and of the minor under this chapter is joint and several.

A parent or guardian not having legal custody of a minor shall not be liable for the conduct of the minor proscribed by this act. [I.C., § 48-702, as added by 1974, ch. 245, § 1, p. 1620; am. 1980, ch. 243, § 2, p. 562.]

**Compiler's notes.** The words "this act" refer to S.L. 1974, ch. 245, § 1 compiled as §§ 48-701 — 48-705.

**48-703. Definitions.** — As used in this chapter:

(a) "Merchandise" means any personal property displayed, held or offered for sale by a merchant.

(b) "Merchant" means an owner or operator, and the agent, consignee, employee, lessee, or officer of an owner or operator, of any merchant's premises.

(c) "Premises" means any establishment or part thereof wherein merchandise is displayed, held or offered for sale.

(d) "Minor" means any person less than eighteen (18) years of age.

(e) "Retail theft" means the alteration, transfer, or removal of any label, price tag, marking, indicia of value or any other markings which aid in the determination of value of any merchandise displayed, held, stored, or offered for sale, in a retail mercantile establishment, for the purpose of attempting to purchase such merchandise either personally or in consort with another, at less than the retail value with the intention of depriving the merchant of the value of such merchandise. [I.C., § 48-703, as added by 1974, ch. 245, § 1, p. 1620; am. 1980, ch. 243, § 3, p. 562.]

**48-704. Authorized actions of merchants.** — (a) Any merchant may request a person on his premises to place or keep in full view any merchandise such person may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase or for any other purpose. No merchant shall be criminally or civilly liable on account of having made such a request.

(b) Any merchant who has reason to believe that merchandise has been taken by a person in violation of this act and that he can recover such



merchandise by taking such a person into custody and detaining him may, for the purpose of attempting to effect such recovery or for the purpose of informing a peace officer of the circumstances of such detention, take the person into custody and detain him, in a reasonable manner and for a reasonable length of time. [I.C., § 48-704, as added by 1974, ch. 245, § 1, p. 1620.]

**Cross ref.** Detention of shoplifting suspects, defense to civil and criminal liability, § 18-4626.

Imprisonment, §§ 22-24.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters. 47 A.L.R.3d 998.

**Collateral References.** 35 C.J.S., False

**48-705. Notice of right of detention.** — No merchant shall be entitled to immunity from liability provided for in this act unless there is displayed in a conspicuous place on his premises a notice not less than thirteen (13) inches wide and twenty-one (21) inches long, clearly legible and in substantially the following form:

ANY MERCHANT OR HIS AGENT WHO HAS REASON TO BELIEVE THAT MERCHANDISE HAS BEEN REMOVED OR CONCEALED BY A PERSON IN VIOLATION OF THIS ACT MAY DETAIN SUCH PERSON FOR THE PURPOSE OF RECOVERING THE PROPERTY OR NOTIFYING A PEACE OFFICER. A PERSON OR THE PARENTS OR LEGAL GUARDIAN OF A MINOR WHO KNOWINGLY REMOVES MERCHANDISE WITHOUT PAYING THEREFOR, OR CONCEALS MERCHANDISE TO AVOID PAYING THEREFOR, IS CIVILLY LIABLE FOR ITS VALUE, AND ADDITIONAL DAMAGES.

[I.C., § 48-705, as added by 1974, ch. 245, § 1, p. 1620.]

## CHAPTER 8

### IDAHO TRADE SECRETS ACT

#### SECTION.

48-801. Definitions.

48-802. Injunctive relief.

48-803. Damages.

48-804. Preservation of secrecy.

#### SECTION.

48-805. Statute of limitations.

48-806. Effect on other law.

48-807. Short title.

**48-801. Definitions.** — As used in this chapter unless the context requires otherwise:

(1) "Improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(2) "Misappropriation" means:

(a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(b) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

- (i) Derived from or through a person who had utilized improper means to acquire it;
- (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Computer program" means information which is capable of causing a computer to perform logical operation(s) and:

- (a) Is contained on any media or in any format;
- (b) Is capable of being input, directly or indirectly, into a computer; and
- (c) Has prominently displayed a notice of copyright, or other proprietary or confidential marking, either within or on the media containing the information.

(5) "Trade secret" means information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Trade secrets as defined in this subsection are subject to disclosure by a public agency according to chapter 3, title 9, Idaho Code. [I.C., § 48-801, as added by 1981, ch. 240, § 1, p. 483; am. 1987, ch. 67, § 1, p. 121; am. 1990, ch. 213, § 68, p. 480.]

**Compiler's notes.** Sections 67 and 69 of S.L. 1990, ch. 213 are compiled as §§ 48-612 and 49-321, respectively.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**Sec. to sec. ref.** This section is referred to in § 9-342A

**Cited in:** Insurance Assocs. Corp. v. Hansen, 111 Idaho 206, 723 P.2d 190 (Ct. App. 1986); Insurance Assocs. Corp. v. Hansen, 116 Idaho 948, 782 P.2d 1230 (1989); Northwest Bec-Corp v. Home Living Serv., 136 Idaho 835, 41 P.3d 263 (2002).

#### ANALYSIS

"Generally known" test.  
Misappropriation.  
Process.

#### "Generally known" Test.

Where the process claimed as a trade secret was not contained in the general knowledge of those in the industry, the district court's findings of fact, when applied to the "generally known" and "readily ascertainable" tests, supported the conclusion that there was a protectable trade secret. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

#### Misappropriation.

A party may not use another's trade secret, even with independent improvements or mod-



ifications, so long as the product or process is substantially derived from the trade secret. This requires the court to apply the test for misappropriation under subsection (2) of this section. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

#### **Process.**

Trade secrets can consist of different steps

that themselves can be readily ascertainable, but the process as a whole may not be readily ascertainable. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

**Collateral References.** Validity, construction and effect of state motor vehicle warranty legislation. 88 A.L.R.5th 301.

**48-802. Injunctive relief.** — (1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order. [I.C., § 48-802, as added by 1981, ch. 240, § 1, p. 483; am. 1990, ch. 274, § 1, p. 774.]

#### **Language of Injunction.**

Because defendant did not object to the specificity of the injunction's language at the hearing held to determine the language to be employed in the injunction, defendant could

not later claim that the trade secret was too vague to comport with the specificity requirement of Rule 65(d) of Idaho Rules of Civil Procedure. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

**48-803. Damages.** — (1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(2) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1) of this section. [I.C., § 48-803, as added by 1981, ch. 240, § 1, p. 483; am. 1990, ch. 274, § 2, p. 774.]

**Compiler's notes.** Section 3 of S.L. 1990, ch. 274 is compiled as § 48-806.

Expert testimony.

#### **Damages.**

#### **Damages.**

—Development costs.

#### **—Development Costs.**

Company which manufactured and marketed hydrocutters, devices which cut pota-

#### **ANALYSIS**

toes into french fries using water, was not entitled to an award of development costs in misappropriation of trade secrets action, where misappropriator did not exploit misappropriated trade secrets or receive unjust enrichment as a result of his action, and where manufacturer failed to introduce reasonable royalty rational or case law as a basis for awarding development costs at trial, re-

viewing court would not address issue on appeal. *GME, Inc. v. Carter*, 128 Idaho 597, 917 P.2d 754 (1996).

**Expert Testimony.**

Damage awards can be based on expert testimony. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 992 P.2d 175 (1999).

**48-804. Preservation of secrecy.** — In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. [I.C., § 48-804, as added by 1981, ch. 240, § 1, p. 483.]

**48-805. Statute of limitations.** — An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim. [I.C., § 48-805, as added by 1981, ch. 240, § 1, p. 483.]

**48-806. Effect on other law.** — (1) Except as provided in subsection (2) of this section, this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil liability remedies for misappropriation of a trade secret.

(2) This chapter does not affect:

- (a) Contractual remedies, whether or not based upon misappropriation of a trade secret; or
- (b) Other civil remedies that are not based upon misappropriation of a trade secret; or
- (c) Criminal remedies, whether or not based upon misappropriation of a trade secret. [I.C., § 48-806, as added by 1981, ch. 240, § 1, p. 483; am. 1990, ch. 274, § 3, p. 774.]

**Compiler's notes.** Section 2 of S.L. 1990, ch. 274 is compiled as § 48-803.

**48-807. Short title.** — This chapter may be cited as the "Idaho Trade Secrets Act." [I.C., § 48-807, as added by 1981, ch. 240, § 1, p. 483.]



## CHAPTER 9

NEW MOTOR VEHICLE WARRANTIES — MANUFACTURER'S DUTY TO REPAIR,  
REFUND OR REPLACE

## SECTION.

48-901. Definitions.

48-902. Manufacturer's duty to repair — Service and repair facilities.

48-903. Manufacturer's duty to refund or replace.

48-904. Manufacturer's duty to consumers with leased vehicles.

48-905. Resale or re-lease of returned motor vehicle.

48-906. Alternative dispute settlement mechanism.

## SECTION.

48-907. Effect and admissibility of decision by informal dispute settlement mechanism.

48-908. Treble damages for bad faith appeal of decision.

48-909. Civil remedy.

48-910. Limitation on actions.

48-911. Remedy nonexclusive.

48-912. Disclosure requirement.

48-913. Dealer liability.

**48-901. Definitions.** — For purposes of this chapter, the following terms have the following meanings:

(1) "Consumer" means the purchaser or lessee, other than for purposes of resale or sublease, of a new motor vehicle used for personal business use, personal, family or household purposes, or a person to whom the new motor vehicle is transferred for the same purposes during the duration of an express warranty applicable to the motor vehicle.

(2) "Early termination costs" means expenses and obligations incurred by a motor vehicle lessor as a result of an early termination of a written lease agreement and surrender of a motor vehicle to a manufacturer under section 48-904, Idaho Code, including penalties for prepayment of finance arrangements.

(3) "Informal dispute settlement mechanism" means an arbitration process or procedure by which the manufacturer attempts to resolve disputes with consumers regarding motor vehicle nonconformities and repairs that arise during the vehicle's warranty period.

(4) "Lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four (4) months, used for personal business use, personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease.

(5) "Manufacturer" means a person engaged in the business of manufacturing, assembling or distributing motor vehicles, who will, under normal business conditions during the year, manufacture, assemble or distribute to dealers at least ten (10) new motor vehicles.

(6) "Manufacturer's express warranty" and "warranty" mean the written warranty of the manufacturer of a new motor vehicle of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty.

(7) "Motor vehicle" means a motor vehicle as defined in chapter 1, title 49, Idaho Code, which is sold or licensed in this state but does not include:

(a) Motorcycle or farm tractor as defined in sections 49-107 and 49-114, Idaho Code; or

(b) Trailer as defined in section 49-121, Idaho Code; or

(c) Any motor vehicle with a gross laden weight over twelve thousand (12,000) pounds.

(8) "Motor vehicle lessor" means a person who holds title to a motor vehicle leased to a lessee under a written lease agreement or who holds the lessor's rights under such agreement. [I.C., § 48-901, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former §§ 48-901, and 48-903 — 48-909, which comprised I.C. 48-901, and 48-903 — 48-909, as added by 1988, ch. 340, § 1, were repealed by S.L. 1998, ch. 333, § 1.

Section 1 of S.L. 1998, ch. 333 contained a repeal.

**48-902. Manufacturer's duty to repair — Service and repair facilities.** — (1) If a new motor vehicle does not conform to all applicable express warranties, and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the term of the applicable express warranties or during the period of two (2) years following the date of original delivery of the new motor vehicle to a consumer, or during the period ending with the date on which the mileage on the motor vehicle reaches twenty-four thousand (24,000) miles, whichever is the earliest date, the manufacturer, its agent, or its authorized dealer shall make the repairs necessary to conform the vehicle to the applicable express warranties, notwithstanding the fact that the repairs are made after the expiration of the warranty term or the two (2) year period.

(2) Every manufacturer of motor vehicles sold and for which the manufacturer has made an express warranty shall maintain sufficient service and repair facilities reasonably close to all areas in which its motor vehicles are sold to carry out the terms of the warranties or designate and authorize as service and repair facilities independent repair or service facilities reasonably close to all areas in which its motor vehicles are sold to carry out the terms of the warranties. As a means of complying with the provisions of this subsection, a manufacturer may, in a town or city where there is not a franchise market representative, enter into warranty service contracts with independent service and repair facilities. [I.C., § 48-902, as added by 1998, ch. 333, § 2, p. 1070; am. 1999, ch. 333, § 1, p. 906.]

**Compiler's notes.** Former § 48-902, which comprised I.C., § 48-902, as added by 1988, ch. 340, § 1, p. 1009; am. 1989, ch. 310,

§ 33, p. 769; am. 1990 ch. 235, § 1, p. 671, was repealed by S.L. 1998, ch. 333, § 1.

#### DECISIONS UNDER PRIOR LAW

##### "Lemon Law."

Because buyer may revoke acceptance only against the seller and because a finding that the purchasers had the right to revoke acceptance against automobile dealer is consistent with a finding that the dealer had not breached any warranties, jury verdict for purchasers was not inconsistent and was permis-

sible on revocation claim against dealer and on the "lemon law" claim against automobile manufacturer. *Griffith v. Latham Motors, Inc.*, 128 Idaho 356, 913 P.2d 572 (1996).

**Collateral References.** Award of attorney's fees under state motor vehicle warranty legislation (lemon laws). 82 A.L.R.5th 501.



**48-903. Manufacturer's duty to refund or replace.** — (1) If the manufacturer, its agents, or its authorized dealers are unable to conform the new motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which impairs the use or market value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer shall either replace the new motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the amount the consumer paid for the vehicle, inclusive of the value of any trade-in, not to exceed one hundred five percent (105%) of the manufacturer's suggested retail price of the motor vehicle. The manufacturer's suggested retail price shall include all manufacturer installed options. The one hundred five percent (105%) cap shall include the cost of any options or other modifications arranged, installed, or made by the manufacturer's agent, or its authorized dealer within thirty (30) days after the date of original delivery. The manufacturer shall refund to the consumer all other charges including, but not limited to, sales or excise tax, license fees and registration fees, reimbursement for towing and rental vehicle expenses incurred by the consumer as a result of the vehicle being out of service for warranty repair. A reasonable allowance for the consumer's use of the vehicle shall be deducted from the refund to the consumer not to exceed the number of miles attributable to the consumer up to the date of the arbitration hearing multiplied by the purchase price of the vehicle and divided by one hundred twenty thousand (120,000). If the manufacturer offers a replacement vehicle under this section, the consumer has the option of rejecting the replacement vehicle and requiring the manufacturer to provide a refund. Refunds must be made to the consumer, and lienholder, if any, as their interests appear on the records of the division of motor vehicles of the Idaho transportation department. A manufacturer must give to the consumer an itemized statement listing each of the amounts refunded under this section. If the amount of sales or excise tax refunded is not separately stated, or if the manufacturer does not apply for a refund of the tax within one (1) year of the return of the motor vehicle, the state tax commission may refund the tax, as determined under subsection (8) of this section, directly to the consumer and lienholder, if any, as their interests appear on the records of the division of motor vehicles. It is an affirmative defense to any claim under this chapter: (a) that an alleged nonconformity does not impair the use or market value, or (b) that a nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of a motor vehicle by anyone other than the manufacturer, its agent or its authorized dealer.

(2) It is presumed that a reasonable number of attempts have been undertaken to conform a new motor vehicle to the applicable express warranties, if: (a) the same nonconformity has been subject to repair four (4) or more times by the manufacturer, its agents, or its authorized dealers within the applicable express warranty term or during the period of two (2) years following the date of original delivery of the new motor vehicle to a consumer or during the period ending with the date on which the mileage on the motor vehicle reaches twenty-four thousand (24,000) miles, whichever is the earliest date, but the nonconformity continues to exist. However, the

manufacturer shall have at least one (1) opportunity to attempt to repair the vehicle before it is presumed a reasonable number of attempts have been undertaken to conform the vehicle to the applicable express warranty; or (b) the vehicle is out of service by reason of repair for a cumulative total of thirty (30) or more business days during the term or during the period, whichever is the earlier date.

(3) If the nonconformity results in a complete failure of the braking or steering system of the new motor vehicle and is likely to cause death or serious bodily injury if the vehicle is driven, it is presumed that a reasonable number of attempts have been undertaken to conform the vehicle to the applicable express warranties if the nonconformity has been subject to repair at least once by the manufacturer, its agents, or its authorized dealers within the applicable express warranty term or during the period of two (2) years following the date of original delivery of the new motor vehicle to a consumer or during the period ending with the date on which the mileage on the motor vehicle reaches twenty-four thousand (24,000) miles, whichever is the earliest date, and the nonconformity continues to exist. However, the manufacturer shall have at least one (1) opportunity to attempt to repair the vehicle before it is presumed a reasonable number of attempts have been undertaken to conform the vehicle to the applicable express warranty.

(4) The term of an applicable express warranty, the two (2) year period and the thirty (30) day period shall be extended by any period of time during which repair services are not available to the consumer because of a war, invasion, strike, or fire, flood, or other natural disaster.

(5) The presumption contained in subsection (2) of this section applies against a manufacturer only if the manufacturer, its agent, or its authorized dealer has received prior written notification from or on behalf of the consumer at least once and an opportunity to cure the defect alleged. If the notification is received by the manufacturer's agent or authorized dealer, the agent or dealer must forward it to the manufacturer by certified mail, return receipt requested. However, if the manufacturer is not notified either by the consumer or the manufacturer's agent or authorized dealer, then the manufacturer shall have at least one (1) opportunity to cure the alleged defect.

(6) The expiration of the time periods set forth in subsection (2) of this section does not bar a consumer from receiving a refund or replacement vehicle under subsection (1) of this section if the reasonable number of attempts to correct the nonconformity causing the substantial impairment occur within three (3) years following the date of original delivery of the new motor vehicle to a consumer, provided the consumer first reported the nonconformity to the manufacturer, its agent, or its authorized dealer during the term of the applicable express warranty.

(7) The manufacturer shall provide to its agent or authorized dealer and, at the time of purchase or lease, the manufacturer's agent or authorized dealer shall provide a written statement to the consumer in the new motor vehicle warranty guide, in 10-point all capital type, in substantially the following form: "IMPORTANT: IF THIS VEHICLE IS DEFECTIVE, YOU



**MAY BE ENTITLED UNDER THE STATE'S LEMON LAW TO REPLACEMENT OF IT OR A REFUND OF ITS PURCHASE PRICE OR YOUR LEASE PAYMENTS. HOWEVER, TO BE ENTITLED TO REFUND OR REPLACEMENT, YOU MUST FIRST NOTIFY THE MANUFACTURER, ITS AGENT, OR ITS AUTHORIZED DEALER OF THE PROBLEM IN WRITING AND GIVE THEM AN OPPORTUNITY TO REPAIR THE VEHICLE. YOU ALSO HAVE A RIGHT TO SUBMIT YOUR CASE TO THE CONSUMER ARBITRATION PROGRAM WHICH THE MANUFACTURER MUST OFFER IN THIS STATE."**

(8) The amount of the sales or excise tax to be paid by the manufacturer to the consumer under subsection (1) of this section shall be the tax paid by the consumer when the vehicle was purchased less an amount equal to the tax paid multiplied by a fraction, the denominator of which is the purchase price of the vehicle and the numerator of which is the allowance deducted from the refund for the consumer's use of the vehicle. [I.C., § 48-903, as added by 1998, ch. 333, § 2, p. 1070; am. 1999, ch. 333, § 2, p. 906.]

**Compiler's notes.** Former § 48-903 was repealed. See Compiler's notes, § 48-901.

**48-904. Manufacturer's duty to consumers with leased vehicles.**

— A consumer who leases a new motor vehicle has the same rights against the manufacturer under this section as a consumer who purchases a new motor vehicle, except that, if it is determined that the manufacturer must accept return of the consumer's leased vehicle pursuant to section 48-903, Idaho Code, then the consumer lessee is not entitled to a replacement vehicle, but is entitled only to a refund as provided in this section. In such a case, the consumer's leased vehicle shall be returned to the manufacturer and the consumer's written lease with the motor vehicle lessor must be terminated after all charges are settled. The manufacturer shall provide the consumer with a full refund of all costs and charges described below less a reasonable allowance for use. The manufacturer shall provide to the consumer a refund of the pro rata amount of any down payment paid by the consumer on the written lease. The pro rata amount of such a refund shall be the amount of the down payment divided by the number of months of the lease agreement and that amount multiplied by the number of months remaining after the date of the arbitration. The manufacturer shall also refund to the consumer amounts identified as additional charges set forth in section 48-903, Idaho Code, if actually paid by the consumer. The reasonable allowance for use shall be the lease payments made by the consumer until the time of the award of a refund. The manufacturer shall provide the motor vehicle lessor or its assignee with a full refund of the early termination charges plus the residual value of the vehicle, as specified in the lease agreement. The amount of any refund by the manufacturer to the consumer for the pro rata portion of the down payment plus the amount of the refund to the motor vehicle lessor or its assignee by the manufacturer shall not exceed one hundred five percent (105%) of the vehicle's original manufacturer's suggested retail price. [I.C., § 48-904, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-904 was repealed. See Compiler's notes, § 48-901.

**48-905. Resale or re-lease of returned motor vehicle.** — (1) If a motor vehicle has been returned under the provisions of section 48-903, Idaho Code, or a similar statute of another state, whether as the result of a legal action or as the result of an informal dispute settlement proceeding, it may not be resold or re-leased in this state unless:

(a) The manufacturer provides the same express warranty it provided to the original purchaser, except that the term of the warranty need only last for twelve thousand (12,000) miles or twelve (12) months after the date of resale, whichever is earlier; and

(b) The manufacturer provides the consumer with a written statement on a separate piece of paper, in 10-point all capital type, in substantially the following form: "IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER BECAUSE IT DID NOT CONFORM TO THE MANUFACTURER'S EXPRESS WARRANTY AND THE NONCONFORMITY WAS NOT CURED WITHIN A REASONABLE TIME AS PROVIDED BY IDAHO LAW."

The provisions of this chapter apply to the resold or re-leased motor vehicle for full term of the warranty required under this section. If a manufacturer has a program similar to the requirements of this subsection and that program provides, at a minimum, substantially the same protections for subsequent consumers, then the manufacturer shall be considered to be in compliance with this subsection.

(2) Notwithstanding the provisions of subsection (1) of this section, if a new motor vehicle has been returned under the provisions of section 48-903, Idaho Code, or a similar statute of another state because of a nonconformity resulting in a complete failure of the braking or steering system of the motor vehicle likely to cause death or serious bodily injury if the vehicle was driven and the failure has not been repaired by the manufacturer, its agent or its authorized dealer, the motor vehicle may not be resold in this state. [I.C., § 48-905, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-905 was repealed. See Compiler's notes, § 48-901.

**48-906. Alternative dispute settlement mechanism.** — (1) Any manufacturer doing business in this state, entering into franchise agreements for the sale of its motor vehicles in this state, or offering express warranties on its motor vehicles sold or distributed for sale in this state shall operate, or participate in, an informal dispute settlement mechanism located in the state of Idaho which complies with the provisions of title 16, code of federal regulations, part 703, and the requirements of this section. The provisions of section 48-903, Idaho Code, concerning refunds or replacement do not apply to a consumer who has not first used this mechanism before commencing a civil action, unless the manufacturer allows a consumer to commence an action without first using this mechanism.



(2) An informal dispute settlement mechanism provided for by this chapter shall, at the time a request for arbitration is made, provide to the consumer and to each person who will arbitrate the consumer's dispute, information about this chapter as approved and directed by the attorney general, in consultation with interested parties. The informal dispute settlement mechanism shall permit the parties to present or submit any arguments based on this chapter and shall not prohibit or discourage the consideration of any such arguments.

(3) If, in an informal dispute settlement mechanism, it is decided that a consumer is entitled to a replacement vehicle or refund under section 48-903, Idaho Code, then any refund or replacement offered by the manufacturer or selected by a consumer shall include and itemize all amounts authorized by section 48-903, Idaho Code. If the amount of excise tax refunded is not separately stated, or if the manufacturer does not apply for a refund of the tax within one (1) year of the return of the motor vehicle, the state tax commission may refund the sales tax, as determined under subsection (8) of section 48-903, Idaho Code, directly to the consumer and lienholder, if any, as their interests appear on the records of the division of motor vehicles of the Idaho transportation department.

(4) No documents shall be received by any informal dispute settlement mechanism unless those documents have been provided to each of the parties in the dispute at or prior to the mechanism's meeting, with an opportunity for the parties to comment on the documents either in writing or orally. If a consumer is present during the informal dispute settlement mechanism's meeting, the consumer may request postponement of the mechanism's meeting to allow sufficient time to review any documents presented at the time of the meeting which had not been presented to the consumer prior to the meeting.

(5) The informal dispute settlement mechanism shall allow each party to appear and make an oral presentation in the state of Idaho unless the consumer agrees to submit the dispute for decision on the basis of documents alone or by telephone, or unless the party fails to appear for an oral presentation after reasonable prior written notice. However, the manufacturer or its representative may participate in the informal dispute settlement mechanism's meeting by telephone if it chooses. If the consumer agrees to submit the dispute for decision on the basis of documents alone, then manufacturer or dealer representatives may not participate in the discussion or decision of the dispute.

(6) Consumers shall be given an adequate opportunity to contest a manufacturer's assertion that a nonconformity falls within intended specifications for the vehicle by having the basis of the manufacturer's claim appraised by a technical expert selected and paid for by the consumer prior to the informal dispute settlement hearing.

(7) Where there has been a recent attempt by the manufacturer to repair a consumer's vehicle, but no response has yet been received by the informal dispute mechanism from the consumer as to whether the repairs were successfully completed, the parties must be given the opportunity to present any additional information regarding the manufacturer's recent repair

attempt before any final decision is rendered by the informal dispute settlement mechanism. This provision shall not prejudice a consumer's rights under this chapter.

(8) If the manufacturer knows that a technical service bulletin directly applies to the specific mechanical problem being disputed by the consumer, then the manufacturer shall provide the technical service bulletin to the consumer at reasonable cost upon request. The mechanism shall review any such technical service bulletins submitted by either party.

(9) A consumer may be charged a fee to participate in an informal dispute settlement mechanism required by this chapter, but the fee may not exceed the conciliation court filing fee in the county where the arbitration is conducted.

(10) Any party to the dispute has the right to be represented by an attorney in an informal dispute settlement mechanism.

(11) The informal dispute settlement mechanism has all the evidence-gathering powers granted an arbitrator under the uniform arbitration act.

(12) A decision issued in an informal dispute settlement mechanism required by this section may be in writing and signed. [I.C., § 48-906, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-906 was repealed. See Compiler's notes, § 48-901.

#### DECISIONS UNDER PRIOR LAW

##### **Arbitration Procedure.**

Because missing information of telephone number and statement was not a substantial departure from the requirements of the federal regulations for arbitration procedures under 16 CFR Part 703, automobile manufac-

turer's arbitration procedure was qualified under § 48-906 and defendants were not entitled to treble damages under § 48-908. *Griffith v. Latham Motors, Inc.*, 128 Idaho 356, 913 P.2d 572 (1996).

**48-907. Effect and admissibility of decision by informal dispute settlement mechanism.** — The decision issued in an informal dispute settlement mechanism required by this chapter is nonbinding on the parties involved, unless otherwise agreed by the parties. Any party, upon application, may remove the decision to district court for a trial de novo. If the manufacturer is aggrieved by the decision of the informal dispute settlement mechanism, an application to remove the decision must be filed in the district court within thirty (30) days after the date the decision is received by the parties. If the application to remove is not made within thirty (30) days, then the district court shall, upon application of a party, issue an order confirming the decision. A written decision issued by an informal dispute settlement mechanism, and any written findings upon which the decision is based, are admissible as nonbinding evidence in any subsequent legal action and are not subject to further foundation requirements. [I.C., § 48-907, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-907 was repealed. See Compiler's notes, § 48-901.



**48-908. Treble damages for bad faith appeal of decision.** — If the district court finds that a party has removed a decision of an informal dispute settlement mechanism in bad faith, by asserting a claim or defense that is frivolous and costly to the other party, or by asserting an unfounded position solely to delay recovery by the other party, then the court shall award to the prevailing party three (3) times the actual damages sustained, together with costs and attorney's fees. [I.C., § 48-908, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-908 was repealed. See Compiler's notes, § 48-901.

#### DECISIONS UNDER PRIOR LAW

##### **Arbitration Procedure.**

Because missing information of telephone number and statement was not a substantial departure from the requirements of the federal regulations for arbitration procedures under 16 CFR Part 703, automobile manufac-

turer's arbitration procedure was qualified under § 48-906 and defendants were not entitled to treble damages under § 48-908. *Griffith v. Latham Motors, Inc.*, 128 Idaho 356, 913 P.2d 572 (1996).

**48-909. Civil remedy.** — Any consumer injured by a violation of this chapter may bring a civil action to enforce this chapter and recover costs and disbursements, including reasonable attorney's fees incurred in the civil action. However, the provisions of this section do not include recovery of attorney's fees previously incurred in the course of informal dispute resolution. In addition to the remedies provided herein, the attorney general may, when in the public interest, bring an action pursuant to the Idaho consumer protection act, chapter 6, title 48, Idaho Code, against any manufacturer for violation of this chapter. For purposes of such action, violations of this chapter shall be deemed to be violations of Idaho's consumer protection act. In any such action, the attorney general and district court shall have the same authority as is granted the attorney general and district court under the Idaho consumer protection act. [I.C., § 48-909, as added by 1998, ch. 333, § 2, p. 1070.]

**Compiler's notes.** Former § 48-909 was repealed. See Compiler's notes, § 48-901.

**Cross ref.** Idaho consumer protection act, § 48-601 et seq.

**48-910. Limitation on actions.** — A civil action brought under this chapter must be commenced within three (3) years of the date of original delivery of the new motor vehicle to a consumer, except that if the consumer applies to an informal dispute settlement mechanism within three (3) years of the date of original delivery of the new motor vehicle to a consumer, and if the consumer is aggrieved by the decision of the informal dispute settlement mechanism, then any appeal of that decision brought under this chapter must be commenced within three (3) months after the date of the final decision by the mechanism. [I.C., § 48-910, as added by 1998, ch. 333, § 2, p. 1070.]

**48-911. Remedy nonexclusive.** — Nothing in this chapter limits the rights or remedies which are otherwise available to a consumer under any other law. [I.C., § 48-911, as added by 1998, ch. 333, § 2, p. 1070.]

**48-912. Disclosure requirement.** — In addition to any investigative powers authorized by law, the attorney general may inspect the records of the informal dispute settlement mechanism upon reasonable notice, during regular business hours, and may make available to the public information about the operation of the mechanism, but data on an individual case may not be disclosed without the prior consent of the affected parties. [I.C., § 48-912, as added by 1998, ch. 333, § 2, p. 1070.]

**48-913. Dealer liability.** — Nothing in this chapter imposes liability on a dealer or creates an additional cause of action by a consumer against a dealer, except for written express warranties made by the dealer apart from the manufacturer's warranties. The manufacturer shall not charge back or require reimbursement by the dealer for any costs, including, but not limited to, any refunds or vehicle replacements, incurred by the manufacturer arising out of this chapter, unless there is evidence that the related repairs had not been carried out by the dealer in a timely manner or in a manner substantially consistent with the manufacturer's published instructions. [I.C., § 48-913, as added by 1998, ch. 333, § 2, p. 1070.]

## CHAPTER 10

### IDAHO TELEPHONE SOLICITATION ACT

#### SECTION.

48-1001. Legislative findings and intent.

48-1002. Definitions.

48-1003. Unlawful acts.

48-1003A. No telephone solicitation contact list.

48-1003B. Consent required for telemarketing charges to previously obtained accounts.

48-1004. Telephone solicitor duties.

48-1005. Exemptions.

#### SECTION.

48-1006. Authority of the attorney general and district court.

48-1007. Private causes of action and remedies.

48-1008. Liability of minors.

48-1009. Consumer notification — Rule making by the Idaho public utilities commission.

48-1010. Limitation of action.

**48-1001. Legislative findings and intent.** — (1) The use of telephones for commercial solicitation is rapidly increasing. This form of communication offers unique benefits, but also entails special risks and the potential for abuse. Many Idaho residents and businesses have lost money or suffered harm primarily as a result of out-of-state telemarketing abuse. For the general welfare of the public and in order to protect the integrity of the telemarketing industry, the following provisions of law are deemed necessary.

(2) It is the intent of the legislature in enacting this chapter to safeguard the public against deceit and financial hardship, to insure, foster and encourage competition and fair dealings among telephone solicitors by requiring adequate disclosure, and to prohibit representations that have the capacity, tendency, or effect of misleading a purchaser. The provisions of this



chapter are remedial, and shall be construed and applied liberally to accomplish the above-stated purposes.

(3) This chapter shall be known and may be cited as the "Idaho Telephone Solicitation Act." [I.C., § 48-1001, as added by 1992, ch. 27, § 1, p. 83.]

**48-1002. Definitions.** — In this chapter:

(1) "Business days" means all days of the week except Saturdays and Sundays and all other legal holidays as defined in section 73-108, Idaho Code.

(2) "Conducting business" means making telephone solicitations either to or from locations within the state of Idaho.

(3) "Goods" means any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value.

(4) "Minor" means any person less than eighteen (18) years of age.

(5) "Newspaper of general circulation" means a newspaper which holds a second class mailing permit from the United States postal service, has at least two hundred (200) subscribers, is made up of at least four (4) pages of at least five (5) columns, is not produced through any type of mimeographing process, and has been published or distributed within the state of Idaho on a weekly basis for at least seventy-eight (78) consecutive weeks, or on a daily basis, which is defined to be no less than five (5) days of any one (1) week, at least twelve (12) months immediately preceding any telephone solicitation done by or on behalf of such newspaper.

(6) "Person" means natural persons, partnerships, both limited and general, corporations, both foreign and domestic, companies, trusts, business entities, associations, both incorporated and unincorporated, and any other legal entity or any group associated in fact although not a legal entity, or any agent, assign, heir, servant, employee or representative thereof.

(7) "Purchaser" means a person who is solicited to become or does become obligated to a telephone solicitor.

(8) "Services" means any work, labor, help, assistance or instruction wherever provided or performed.

(9) "Telephone directory of general circulation" means a directory containing telephone numbers of individual residents and/or businesses which is published on a community-wide or regional basis and which is widely available to persons residing in such community or region through free distribution or direct purchase of said directory without the requirement of other purchases or affiliations.

(10) "Telephone solicitation" means:

(a) Any unsolicited telephone call to a purchaser for the purpose of asking, inducing, inviting, requesting, or encouraging the purchaser to purchase or invest in goods or services during the course of a telephone call; or

(b) Any communication in which:

(i) A free gift, award, or prize is offered, or in which it is represented or implied that goods or services are offered below the regular price of the goods or services; and

(ii) A return telephone call is invited or the communication is followed up by a call to the purchaser by the telephone solicitor; and

(iii) It is intended during the course of the return or follow-up call with the purchaser that an agreement to purchase, or a purchase be made.

(c) For purposes of this subsection, "communication" means a written or oral statement or notification or advertisement transmitted to the purchaser through any means.

(11) "Telephone solicitor" means any person who, on his own behalf or through other persons or through use of an automatic dialing-announcing device, engages in a telephone solicitation.

(12) "Unsolicited advertisement" means any advertisement offering goods or services which is transmitted to any person without that person's prior express invitation or permission unless an established business relationship exists between the sender and recipient which has not been terminated by either party.

(13) "Written confirmation" means a writing that includes the following information: the date of purchase, the telephone solicitor's complete address and registration number, a listing of all goods and/or services purchased, a listing of the price of each good and/or service purchased, the total obligation incurred by the purchaser, and the notice of cancellation as set forth in subsection (2) of section 48-1004, Idaho Code. [I.C., § 48-1002, as added by 1992, ch. 27, § 1, p. 83; am. 1998, ch. 331, § 1, p. 1064; am. 2000, ch. 452, § 2, p. 1422.]

**Compiler's notes.** Section 3 of S.L. 2000, ch. 452, is compiled as § 48-1003A.

Section 4 of S.L. 2000, ch. 452 provides that the act shall be in full force and effect on and after January 1, 2001.

**Sec. to sec. ref.** This section is referred to in §§ 48-1003A and 48-1003B.

**48-1003. Unlawful acts.** — (1) It is an unlawful act for a telephone solicitor to:

- (a) Intimidate or torment any person of normal and reasonable sensitivities in connection with a telephone solicitation;
- (b) Refuse to hang up and free the purchaser's line immediately once requested to do so by the purchaser;
- (c) Misrepresent the price, quality, or availability of the goods or services being offered to the purchaser, or not to disclose all material matters relating directly or indirectly to the offered goods or services;
- (d) Advertise, represent, or imply that the person has the approval or endorsement of any government, governmental office, or agency, unless such is the fact;
- (e) Advertise, represent, or imply that the person has a valid registration number when the person does not;
- (f) Utilize any device or method to block or mislead the intended recipient of the call as to the identity of the solicitor, or the trade name of the person being represented by the solicitor on a caller identification telecommunication device;
- (g) Fail to comply with the provisions of section 48-603A, Idaho Code;
- (h) Violate any applicable provision or requirement of this chapter; and
- (i) Send an unsolicited advertisement to a telephone facsimile machine.



(2) Any violation of the provisions of this chapter is an unlawful, unfair, and deceptive act or practice in trade or commerce for the purpose of applying the Idaho consumer protection act, chapter 6, title 48, Idaho Code. [I.C., § 48-1003, as added by 1992, ch. 27, § 1, p. 83; am. 1997, ch. 224, § 1, p. 660; am. 1999, ch. 46, § 1, p. 108.]

**Legislative Intent.** Section 1 of S.L. 1997, ch. 75 read: "The Legislature finds that with respect to pay-per-telephone call complaints received by state agencies, the overwhelming majority of them involve disputes over whether the consumer called or did not place a significant number of instances, the consumer being charged did not place the call in question. Nevertheless, these citizens have been subjected to various collection efforts, some unconscionable, which seek to coerce consumers into paying the charges regardless of their authenticity. These consumers are faced with the treat of lawsuits, notoriety, and embarrassment if they decline to pay. There-

fore, this state's policy shall be as stated in a new Section 48-1108, Idaho Code, which is that, unless excepted, charges for any adult entertainment pay-per-telephone call shall be void and unenforceable if the consumer has not first entered into a presubscription or comparable agreement, as defined in Section 48-1102, Idaho Code, to purchase the adult entertainment pay-per-telephone call. Also, any effort by the provider of the adult entertainment pay-per-telephone call to collect the charges absent an agreement shall be considered a false and deceptive practice in violation of the Idaho Consumer Protection Act."

#### **48-1003A. No telephone solicitation contact list. —**

(1)(a) Any residential, mobile or telephonic paging device telephone subscriber desiring to be placed on a "no telephone solicitation contact" list, indicating that the subscriber does not wish to receive telephone solicitations, may be placed upon such list by notifying the attorney general in writing and paying the attorney general an initial list fee, which the attorney general may assess in an amount up to ten dollars (\$10.00) per subscriber. The subscriber's notice shall be in a form approved by the attorney general. The subscriber's listing shall be for a period of up to three (3) years, and may be renewed by the attorney general for additional periods of up to three (3) years each, if the subscriber requests renewal and pays a renewal list fee, which the attorney general may assess in an amount up to five dollars (\$5.00) per renewal.

(b) The first "no telephone solicitation contact" list shall be published on or before June 30, 2001. The attorney general shall thereafter update his "no telephone solicitation contact" list quarterly and provide this list to telephone solicitors upon request and receipt of a list distribution fee, which the attorney general may charge in an amount up to twenty-five dollars (\$25.00) per list.

(c) All fees imposed pursuant to this section shall be deposited in the consumer protection account and shall be used for the furtherance of the attorney general's duties and activities under this section.

(2) Within thirty (30) days after a new "no telephone solicitation contact" list has been published by the attorney general, no telephone solicitor shall make or cause to be made any telephone solicitation, as defined by section 48-1002(10) (a), Idaho Code, to any telephone number which is assigned by a telephone company to a person listed on the "no telephone solicitation contact" list as appears in the then current quarterly listing published by the attorney general.

(3) Section 48-1006, Idaho Code, notwithstanding, any violation of this section shall subject the person violating the terms of this section to a civil penalty, to be imposed by the district court, as follows: for the first violation, not to exceed five hundred dollars (\$500); for the second violation, not to exceed two thousand five hundred dollars (\$2,500); for the third and subsequent violations, not to exceed five thousand dollars (\$5,000) per violation. Penalties received under this section shall be expended pursuant to legislative appropriation.

(4) This section is not applicable to telephone solicitations:

(a) To a telephone subscriber's commercial or business telephone number;

(b)(i) Where an established business relationship exists between the telephone solicitor and the telephone subscriber; provided however, the established and existing business relationship exception shall not apply between a telephone company and a telephone subscriber under this section unless the telephone subscriber shall have previously consented to receive a telephone solicitation from such company or its agent;

(ii) For purposes of this section, "telephone company" means a person providing telecommunications services to the public, or any segment thereof, for compensation, by wire, cable, radio, lightwaves, cellular signal or other means. "Telecommunications services" means the conveyance of voice, data, sign, signal, writing, sound, messages or other information at any frequency over any part of the electromagnetic spectrum;

(c) By a minor seeking to sell a good or service, pursuant to a telephone solicitation, for a charitable purpose or organization.

(5) The attorney general shall advise telephone subscribers who register with his office under this section of all self-help measures available to them to reduce unwanted telephone solicitations. [I.C., § 48-1003A, as added by 2000, ch. 452, § 3, p. 1422.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 452, is compiled as § 48-1002.

Section 4 of S.L. 2000, ch. 452 provides that

the act shall be in full force and effect on and after January 1, 2001.

**48-1003B. Consent required for telemarketing charges to previously obtained accounts. —** (1) As used in this section:

(a) "Account" means a credit card, debit card, checking account, savings account, loan account, telephone service account, utility account or other similar account.

(b) "Account holder" means a consumer who owns an account, or a consumer who has authority to cause a charge or debit to an account.

(c) "Authorization" means an account holder providing express consent to a telemarketer or person acting on behalf of the telemarketer, to charge or cause to be charged the account holder's account for the purchase of goods or services. Authorization is not effective until the account holder has been advised, clearly and conspicuously:

(i) That the telemarketer has the account holder's account number;

(ii) That the telemarketer is going to charge the account holder's account;



(iii) The specific account that will be charged;

(iv) The specific amount that the account holder's account will be charged; and

(v) The name, address and telephone number of the person who will be charging the account holder's account.

(d) "Charge" means a charge or debit, or an attempt to charge or debit, an account, if that account can be charged without the express written authorization of the account holder to each specific charge or debit. Charge does not include a charge or debit, or an attempt to charge or debit, a telephone service account for local or long distance telecommunications services. A charge can occur by electronic or any other means.

(e) "Goods" or "services" has the meaning given to them in section 48-1002(3) and (8), Idaho Code, except that for purposes of this section these terms are limited to goods or services which are normally used for personal, household or family purposes.

(f) "Previously obtained account number telemarketing call" means a telephone call in which the telemarketer attempts to obtain account holder authorization for a current or future charge without obtaining the account number from the account holder during the call; provided however, that "previously obtained account number telemarketing call" does not include the sale of securities through a telephone call, if the telemarketer is a licensed securities agent or broker in the state of Idaho; provided further, that "previously obtained account number telemarketing call" does not include a telephone call initiated by an account holder during which the person receiving the telephone call attempts to sell, offer for sale, or otherwise induce the account holder to purchase goods or services. A "previously obtained account number telemarketing call" does not include a call to or from a current customer of the telemarketer to renew or extend, inquire about or add goods or services if the customer has previously provided account information for billing purposes to the telemarketer and the telemarketer clearly and conspicuously discloses that such renewal or extension, or additional goods or services, will be debited to the same account.

(g) "Telemarketer" means any person who regularly engages in previously obtained account number telemarketing call.

(2) A telemarketer shall not charge or cause a charge to an account holder's account as a result of a previously obtained account number telemarketing call unless the telemarketer has first obtained authorization from the account holder for the specific charge discussed during the call.

(3) An account holder's authorization can be in writing or given verbally. If the telemarketer uses written authorization, the telemarketer cannot charge the account holder's account until the account holder's written authorization is received by the telemarketer. If the telemarketer uses verbal authorization, either (i) the authorization must be audio taped by the telemarketer and the telemarketer must advise the account holder that his or her authorization is being recorded or (ii) the account holder must disclose the last four (4) digits of the account holder's account number if the telemarketer has reasonable procedures in effect to verify that such digits as

provided by the account holder match the last four digits of the account to be charged. Authorizations must be kept and maintained for a period of two (2) years and must also be made available to the account holder upon written request.

(4)(a) In the case where a telemarketer utilizes a voice response unit, whether inbound or outbound, an account holder may give authorization by providing the last four (4) digits of the account holder's account number, an account number previously assigned to the account holder by the telemarketer, or an alternate unique identifier which enables the telemarketer to verify or confirm the account holder's authorization; provided however, that the information set forth in subsection (1)(c) of this section must first be clearly and conspicuously disclosed to the account holder.

(b) For purposes of this subsection, "voice response unit" means a device which allows a user to provide or obtain information from a computer system using touch-tone input or speech input. [I.C., § 48-1003B, as added by 2001, ch. 315, § 1, p. 1123.]

**48-1004. Telephone solicitor duties. —** (1) Telephone solicitors shall:

(a) Register with the attorney general at least ten (10) days prior to conducting business in Idaho. All registrations shall be valid for a period of one (1) year from the effective date of the registration. Any information reported in the application which has changed during the year shall be reported within two (2) weeks of such change to the attorney general and shall be included in an amended registration form filed at the time the telephone solicitor renews his registration. Registrations may be renewed annually by applying to the attorney general and paying a registration renewal fee;

(b) File with the attorney general an irrevocable consent appointing the attorney general as an agent to receive civil process in any action, suit, or proceeding brought under this chapter;

(c) Provide his registration number to any purchaser who requests the registration number;

(d) Orally inform the purchaser at the time the purchase is completed of his right to cancel as provided in subsection 48-1004(2), Idaho Code; and state the telephone solicitor's registration number issued by the attorney general;

(e) Provide accurate and complete information when making a registration application and possess and maintain a valid registration as required in this chapter; and

(f) Give the full street address, including the telephone number, of the telephone solicitor if a sale or purchase is completed.

(2) Unless the purchaser has an unqualified right to return the goods or cancel the services and receive a full refund, the telephone solicitor shall send a written confirmation to the purchaser, which shall contain the following statement in ten (10) point bold face type, which sets forth a purchaser's right to cancel any agreement made pursuant to a telephone solicitation under this section:



## NOTICE OF CANCELLATION

You may cancel this transaction, without any penalty or obligation whatsoever, within three business days of the date in which you receive this written confirmation.

If you cancel, all payments or other consideration which may have already been made by you will be returned within ten business days following receipt by the telephone solicitor of your cancellation notice.

If you cancel, you must return the goods to the telephone solicitor at the address listed below and at the telephone solicitor's risk and expense within twenty-one days of the date you receive back from the telephone solicitor the payments or consideration you have already made.

To cancel this transaction, deposit in the mail or deliver a signed and dated copy of this cancellation notice or any other written notice to  
(Name of telephone solicitor) , at (Address of seller's place of business) not later than midnight of the third business day after which you received this notice.

I hereby cancel this transaction.

(Date)

(Buyer's signature)

[I.C., § 48-1004, as added by 1992, ch. 27, § 1, p. 83.]

**Sec. to sec. ref.** This section is referred to in § 48-1002.

**48-1005. Exemptions.** — (1) The following telephone solicitors are exempt from the provisions of section 48-1004, Idaho Code:

(a) A person engaging in telephone solicitations where:

- (i) The solicitation is an isolated transaction and not done in the course of a pattern of repeated transactions of like nature; or
- (ii) Less than sixty percent (60%) of such person's prior year's sales were made as a result of telephone solicitations as defined in this chapter.

(b) A person making a telephone solicitation where the purchaser contacted has previously purchased goods or services from the person or the business entity for which the person is calling.

(c) A person making a telephone solicitation:

- (i) Without the intent to make or obtain provisional acceptance of a purchase during the telephone solicitation; and
- (ii) Who only arranges for the major sales presentation to be made at a later face-to-face meeting between the person and the purchaser, and the later face-to-face meeting is not for the purpose of collecting the payment or delivering any item purchased.

(d) A person whose business is licensed by any federal or state of Idaho governmental agency, except the secretary of state office, which has the power to revoke any license issued by the agency.

(e) A person making a telephone solicitation solely for purposes of selling a subscription to or advertising in a newspaper or telephone directory of general circulation.

(f) A person making a telephone solicitation solely for purposes of selling a magazine, periodical, book, or musical or video recording:

(i) Under which the telephone solicitor provides the purchaser with a form which the purchaser may use to instruct the telephone solicitor not to ship the merchandise; and

(ii) Which complies with the federal trade commission's "use of negative option plans by sellers in commerce rule," 16 CFR 425, regulation concerning "use of negative option plans by sellers in commerce" or a continuity plan, subscription arrangement, series arrangement or single purchase under which the telephone solicitor ships goods to a purchaser who has consented in advance to receive such goods and the purchaser is given the opportunity to review goods for at least seven (7) days and to receive a full refund for return of undamaged goods.

(g) A person who has at least one (1) business location in the state under the same name as that used in connection with telephone solicitations and ninety percent (90%) of the person's business involves the purchaser's obtaining services and products at the person's business location.

(h) An issuer or subsidiary of an issuer that has a class of securities which is subject to section 12 of the securities exchange act of 1934 (15 USC sec. 781) and which is either registered or exempt from registration under paragraphs (A), (B), (C), (E), (F), (G) or (H) of subsection (g)(2) of that section.

(i) A person who solicits sales by periodically publishing and delivering a catalog of the person's merchandise to purchasers if the catalog:

(i) Contains a written description or illustration of each item offered for sale;

(ii) Includes the business address or home office address of the telephone solicitor;

(iii) Includes at least twenty-four (24) pages of written material and illustrations and are distributed in more than one state; and

(iv) Has an annual circulation by mailing of not less than two hundred fifty thousand (250,000).

(2) In any action, suit, or proceeding to enforce the provisions of this chapter, the burden of proving an exemption is upon the person claiming it. [I.C., § 48-1005, as added by 1992, ch. 27, § 1, p. 83; am. 1993, ch. 156, § 1, p. 399.]

**Compiler's notes.** Section 2 of S.L. 1993, ch. 156 declared an emergency. Approved March 25, 1993.

#### **48-1006. Authority of the attorney general and district court. —**

(1) The attorney general and the district court shall have the same authority in enforcing and carrying out the provisions of this chapter as is granted the attorney general and district courts under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(2) All penalties, costs and fees received or recovered by the attorney general shall be remitted to the consumer protection account and expended pursuant to subsection (5) of section 48-606, Idaho Code.



(3) The attorney general shall also have the following authority:

(a) To require the registering telephone solicitor to submit information necessary to assist the attorney general in enforcing the provisions of this section;

(b) To require each registering telephone solicitor to remit a registration fee of fifty dollars (\$50.00) or a registration renewal fee of twenty-five dollars (\$25.00);

(c) To send to each registrant a certificate or other appropriate document demonstrating registration compliance which shall be prominently posted in a publicly accessible place at the telephone solicitor's principal business location; and

(d) To accept service for those telephone solicitors who are required to register and appoint the attorney general as agent to receive civil process. Service may be effected by leaving a copy of the summons and complaint in the office of the attorney general, but it is not effective and complete until five (5) days after:

(i) The plaintiff forthwith sends notice of the service and a copy of the summons and complaint by registered mail to the telephone solicitor at its last address on file with the attorney general; and

(ii) The plaintiff files an affidavit of compliance with the provisions of this section with the district court. [I.C., § 48-1006, as added by 1992, ch. 27, § 1, p. 83.]

**Sec. to sec. ref.** This section is referred to in § 48-1003A.

**48-1007. Private causes of action and remedies.** — (1) Any person who purchases goods or services pursuant to a telephone solicitation and thereby suffers damages as a result of any act, conduct, or practice declared unlawful in this chapter shall have the same rights and remedies in seeking and obtaining redress under this chapter as those granted under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(2) If a telephone solicitor violates any applicable provision of this chapter, any contract of sale or purchase is null and void and unenforceable.

(3) If a telephone solicitor fails to deliver the goods or services contracted for, pursuant to the federal trade commission's "mail order merchandise rule," 16 CFR 435, the contract to purchase is null and void.

(4) Any contract, agreement to purchase, or written confirmation executed by a purchaser which purports to waive any of the purchaser's rights under this chapter is against public policy and shall be null and void and unenforceable.

(5) The remedies provided for in this chapter are not exclusive, and shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law. [I.C., § 48-1007, as added by 1992, ch. 27, § 1, p. 83.]

**48-1008. Liability of minors.** — (1) Any minor who purchases goods or services pursuant to any telephone solicitation may disaffirm the purchase within a reasonable time after the purchase is made.

(2) No parent or legal guardian, having legal custody of a minor who is a purchaser pursuant to a telephone solicitation, shall be liable to a telephone solicitor for the purchase of goods or services pursuant to any telephone solicitation. [I.C., § 48-1008, as added by 1992, ch. 27, § 1, p. 83.]

**48-1009. Consumer notification — Rule making by the Idaho public utilities commission.** — (1) Telephone corporations providing basic local exchange service, as defined in section 62-603, Idaho Code, shall inform customers of the provisions of this chapter. Publication of such notification in an annual insert in a billing statement mailed to customers or by conspicuous publication in the consumer information pages of local telephone directories shall relieve telephone corporations of any and all liability under this chapter to purchasers or others claiming to have suffered harm from telephone solicitors or by operation of the provisions of this chapter.

(2) The public utilities commission shall by rule prescribe the form of such notice. [I.C., § 48-1009, as added by 1992, ch. 27, § 1, p. 83.]

**48-1010. Limitation of action.** — (1) No private action may be brought under the provisions of this chapter more than two (2) years after the cause of action accrues.

(2) A cause of action shall be deemed to have accrued when the party bringing an action under the provisions of this chapter knows or in the exercise of reasonable care should have known about the violation of the provisions of this chapter. [I.C., § 48-1010, as added by 1992, ch. 27, § 1, p. 83.]

## CHAPTER 11

### IDAHO PAY-PER-TELEPHONE CALL ACT

#### SECTION.

- 48-1101. Legislative findings and intent.
- 48-1102. Definitions.
- 48-1103. Preamble message.
- 48-1104. Advertisements.
- 48-1105. Remedies.

#### SECTION.

- 48-1106. Authority of the attorney general and district court.
- 48-1107. Limitations of action.
- 48-1108. Adult entertainment pay-per-telephone calls.

**48-1101. Legislative findings and intent.** — (1) The use of pay-per-telephone call services for commercial solicitation is rapidly increasing. This form of communication offers unique benefits, but also entails special risks and the potential for abuse. Many consumers of goods and services have suffered serious losses because of misrepresentations and failures to disclose material facts. For the general welfare of the public and in order to protect the integrity of the pay-per-telephone call service industry, the following provisions of law are deemed necessary.

(2) It is the intent of the legislature in enacting this chapter to safeguard the public against deceit and financial hardship, to insure, foster and encourage competition and fair dealings among information providers by



requiring adequate disclosure. The provisions of this chapter are remedial, and shall be construed and applied liberally to accomplish these purposes.

(3) This chapter shall be known and may be cited as the "Idaho Pay-Per-Telephone Call Act." [I.C., § 48-1101, as added by 1992, ch. 29, § 1, p. 90.]

**48-1102. Definitions.** — In this chapter:

(1) "Adult entertainment pay-per-telephone call" means any pay-per-telephone call service that is of a sexually prurient nature. For the purpose of this section, sexually prurient is any comment, request, suggestion, proposal, image, or other communication that, in context, is obscene, lewd, lascivious, or indecent.

(2) "Information provider" means any person, company, or corporation that controls the content of a pay-per-telephone call service. Any telephone corporation which transmits pay-per-telephone call service but does not control the content of the information transmitted is not included within this definition.

(3) "Pay-per-telephone call service" means any telecommunications service which permits simultaneous calling by a number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription or comparable agreement and for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call.

(4) "Presubscription or comparable agreement" means an agreement to purchase any pay-per-telephone call service and is evidenced by:

(a) A written contractual agreement between an information provider and a legally competent person that is executed for the sole purpose of arranging purchase of pay-per-telephone call services and is separate or easily severable from any promotions or inducements, and in which:

(i) The information provider clearly and conspicuously discloses to the consumer all material terms and conditions associated with the use of the service, including the information provider's name and address, a business telephone number which the company may use to obtain additional information or to register a complaint, and the rates of service;

(ii) The information provider agrees to notify the consumer at least one (1) billing cycle in advance of any future rate changes;

(iii) The consumer agrees to use the services on the terms and conditions disclosed by the information provider; and

(iv) The information provider requires the use of an identification number or other means to prevent unauthorized access to the service by the nonsubscribers; or

(b) Disclosure of a pre-existing credit, prepaid account, debit, charge, or calling card number, along with authorization to bill that number, provided that the card:

(i) Is subject to the dispute resolution procedures of the federal truth-in-lending and fair credit reporting acts;

(ii) Has, upon request or application, been delivered to the person to be billed prior to assessment of charges; and

(iii) Does not operate to assess charges through automatic number identification.

(5) "Telephone corporation" means any person or corporation that provides basic local exchange service or message telecommunication service. [I.C., § 48-1102, as added by 1992, ch. 29, § 1, p. 90; am. 1997, ch. 75, § 2, p. 155.]

**Legislative Intent.** Section 1 of S.L. 1997, ch. 75 read: "The Legislature finds that with respect to pay-per-telephone call complaints received by state agencies, the overwhelming majority of them involve disputes over whether the consumer called or did not place an adult entertainment pay-per-telephone call. The legislature finds that, in a significant number of instances, the consumer being charged did not place the call in question. Nevertheless, these citizens have been subjected to various collection efforts, some unconscionable, which seek to coerce consumers into paying the charges regardless of their authenticity. These consumers are faced with the threat of lawsuits, notoriety, and embarrassment if they decline to pay. Therefore,

this state's policy shall be as stated in a new Section 48-1108, Idaho Code, which is that, unless excepted, charges for any adult entertainment pay-per-telephone call shall be void and unenforceable if the consumer has not first entered into a presubscription or comparable agreement, as defined in Section 48-1102, Idaho Code, to purchase the adult entertainment pay-per-telephone call. Also, any effort by the provider of the adult entertainment pay-per-telephone call to collect the charges absent an agreement shall be considered a false and deceptive practice in violation of the Idaho Consumer Protection Act."

**Compiler's notes.** Section 3 of S.L. 1997, ch. 75 is compiled as § 48-1108.

**48-1103. Preamble message.** — (1) An information provider that offers pay-per-telephone call services in this state shall include at the beginning of its service a preamble message. No preamble message shall be required for pay-per-telephone call service for which the total charge for such service is two dollars (\$2.00) or less.

(2) The preamble message shall be clearly understandable and audible and state the cost of the call. The preamble must disclose all per-call charges. If the call is billed on a usage sensitive basis, the preamble must state all rates, by minute or other unit of time, any minimum charges and the total cost for calls to that service if the duration of the service can be determined.

(3) The preamble must state the name of the information provider and accurately describe the information, product, or service that the caller will receive for the fee.

(4) The preamble must inform the caller that billing will begin only after a specific identified event following the disclosure message, such as a signal tone, and must provide a reasonable opportunity for the caller to disconnect before that event.

(5) Any preamble message associated with a pay-per-telephone call service that is aimed at or likely to be of interest to children under the age of eighteen (18) must contain a statement that the caller should hang up unless he has parental permission.

(6) A caller may be provided the means to bypass the preamble message on subsequent calls, provided that the caller has sole control of that capability, except that any bypass device shall be disabled for a period of thirty (30) days following the effective date of a price increase for the service. Instructions on how to bypass must either be at the end of the preamble message or at the end of the service.



(7) If the pay-per-telephone call service originates and terminates within local exchange areas served by the same telephone corporation within the state of Idaho, the information provider may apply to the Idaho attorney general for permission to modify the preamble message. The attorney general may grant such permission if the attorney general is satisfied that the modified message will adequately disclose sufficient material facts which will safeguard the public against deceit and financial hardship. Such decision shall be final and nonappealable. [I.C., § 48-1103, as added by 1992, ch. 29, § 1, p. 90.]

**48-1104. Advertisements.** — (1) If the total charge for the pay-per-telephone call service is more than two dollars (\$2.00), advertisements by information providers for pay-per-telephone call services must clearly and conspicuously disclose, as that term is defined by the Idaho consumer protection act and regulations promulgated thereunder, the price or cost of the service being advertised, and contain the information required to be set forth in subsection (2) of section 48-1103, Idaho Code, except as provided in subsection (2) of this section.

(2) For purposes of this chapter, a listing in any section of a directory in which businesses or professions are listed alphabetically and which directory is not published more often than twice in a consecutive twelve (12) month period of time, does not constitute an advertisement. Information providers that advertise pay-per-telephone call services in the section of a directory which lists businesses by subject category, and which directory is not published more often than twice in a consecutive twelve (12) month period of time, shall conspicuously disclose in the advertisement that the service is a pay-per-telephone call service but need not disclose the price or cost of the service. [I.C., § 48-1104, as added by 1992, ch. 29, § 1, p. 90; am. 1992, ch. 100, § 1, p. 318.]

**Compiler's notes.** The Idaho consumer protection act, referred to in subsection (1) of this section, is compiled as §§ 48-601 through 48-617.

**48-1105. Remedies.** — (1) When an information provider has failed to comply with any provision of this chapter, any obligation by a consumer that may have arisen from the dialing of a pay-per-telephone call service is void and unenforceable.

(2) Any failure to comply with any provision of this chapter is an unfair and deceptive act or practice. Any person aggrieved by a violation of this chapter shall be entitled to all available remedies against the information provider, pursuant to the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(3) The remedies provided for in this chapter are not exclusive, and shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other statute. [I.C., § 48-1105, as added by 1992, ch. 29, § 1, p. 90.]

**48-1106. Authority of the attorney general and district court.** — The attorney general and district court shall have the same authority in

enforcing and carrying out the provisions of this chapter as is granted the attorney general and district court under the Idaho consumer protection act, chapter 6, title 48, Idaho Code. [I.C., § 48-1106, as added by 1992, ch. 29, § 1, p. 90.]

**48-1107. Limitations of action.** — (1) No private action may be brought under the provisions of this chapter more than two (2) years after the cause of action accrues.

(2) A cause of action shall be deemed to have accrued when the party bringing an action under the provisions of this chapter knows or in the exercise of reasonable care should have known about the violation of the provisions of this chapter. [I.C., § 48-1107, as added by 1992, ch. 29, § 1, p. 90.]

**48-1108. Adult entertainment pay-per-telephone calls.** — (1) Except as provided in subsection (2) of this section, no charge of any nature for any adult entertainment pay-per-telephone call is valid and enforceable unless the consumer has first entered into a presubscription or comparable agreement to purchase the adult entertainment pay-per-telephone call. Any adult entertainment pay-per-telephone call charges incurred absent a presubscription or comparable agreement are void and unenforceable.

(2) The second and successive time a consumer receives a telephone bill that includes charges for an adult entertainment pay-per-telephone call, the charges, if incurred absent a presubscription or comparable agreement, are void and unenforceable if:

(a) The charges were incurred as the result of third-party fraud; or

(b) The bill is sent to the consumer by a telephone corporation as a holder in due course and, upon written notification to the applicable telephone corporation of the disputed charge, the telephone corporation is able to recourse the bill back to the information provider or its agent.

(3) Any information provider which, on its own, or through an agent, assign, or successor who seeks to collect a charge of any nature for an adult entertainment pay-per-telephone call that does not have a presubscription or comparable agreement evidencing the consumer's agreement to purchase the call, has committed an unfair, unlawful and deceptive act or practice in trade and commerce for purposes of applying the Idaho consumer protection act, chapter 6, title 48, Idaho Code. [I.C., § 48-1108, as added by 1997, ch. 75, § 3, p. 155.]

**Legislative Intent.** Section 1 of S.L. 1997, ch. 75 read: "The Legislature finds that with respect to pay-per-telephone call complaints received by state agencies, the overwhelming majority of them involve disputes over whether the consumer called or did not place an adult entertainment pay-per-telephone call. The legislature finds that, in a significant number of instances, the consumer being charged did not place the call in question. Nevertheless, these citizens have been subjected to various collection efforts, some un-

conscionable, which seek to coerce consumers into paying the charges regardless of their authenticity. These consumers are faced with the threat of lawsuits, notoriety, and embarrassment if they decline to pay. Therefore, this state's policy shall be as stated in a new Section 48-1108, Idaho Code, which is that, unless excepted, charges for any adult entertainment pay-per-telephone call shall be void and unenforceable if the consumer has not first entered into a presubscription or comparable agreement, as defined in Section 48-



1102, Idaho Code, to purchase the adult entertainment pay-per-telephone call. Also, any effort by the provider of the adult entertainment pay-per-telephone call to collect the charges absent an agreement shall be considered a false and deceptive practice in violation

of the Idaho Consumer Protection Act.”

**Compiler's notes.** Section 2 of S.L. 1997, ch. 75 is compiled as § 48-1102.

Section 4 of S.L. 1997, ch. 75 declared an emergency. Approved March 13, 1997.

## CHAPTER 12

### IDAHO CHARITABLE SOLICITATION ACT

#### SECTION.

48-1201. Legislative findings and intent.

48-1202. Definitions.

48-1203. Unlawful acts.

48-1204. Authority of the attorney general and district court.

#### SECTION.

48-1205. Private causes of action and remedies.

48-1206. Limitation of action.

**48-1201. Legislative findings and intent.** — (1) The incidents of deceptive collection of funds in the name of charities are increasing in Idaho. Many generous Idahoans and legitimate charities suffer financial losses because of misrepresentations and failures to disclose material facts by those who falsely claim to represent a charitable organization or purpose.

(2) It is the intent of the legislature to safeguard the public against deceit and financial hardship, to ensure, foster, and encourage truthful solicitation and prohibit representations that have the capacity, tendency, or effect of misleading a contributor or harming the reputation of charitable organizations that do not make such representations. The provisions of this chapter are remedial, and shall be construed and applied liberally to accomplish the above-stated purposes.

(3) This chapter shall be known and may be cited as the “Idaho Charitable Solicitation Act.” [I.C., § 48-1201, as added by 1993, ch. 246, § 1, p. 857.]

**48-1202. Definitions.** — In this chapter:

(1) “Charitable organization” means:

(a) Any person determined by the Internal Revenue Service to be tax exempt pursuant to section 501(c) (3) of the Internal Revenue Code; or

(b) Any person who is or who holds himself out to be established for any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental, civic, veteran or other eleemosynary purpose or for the benefit of law enforcement personnel, firefighters or other persons who protect the public safety, or any person who in any manner engages in a charitable solicitation.

(2) “Charitable purpose” means:

(a) Any purpose described in Internal Revenue Code section 501(c) (3); or

(b) Any benevolent, educational, philanthropic, humane, scientific, patriotic, social welfare or advocacy, public health, environmental, civic, veteran, or other eleemosynary purpose or for the benefit of law enforcement personnel, firefighters or other persons who protect the public safety.

(3) “Charitable solicitation” means any oral or written request, directly or indirectly, for money, credit, property, financial assistance or other thing of

value on the plea or representation that such money, credit, property, financial assistance or other thing of value or any portion thereof, will be used for a charitable purpose or benefit a charitable organization. No contribution need be made in order for a charitable solicitation to be deemed to have taken place.

(4) "Container" means any box, carton, package, receptacle, canister, jar, dispenser or machine that offers a product for sale or distribution as part of a charitable solicitation.

(5) "Contribution" means the grant, promise or pledge of money, credit, property, financial assistance or other thing of value in response to a charitable solicitation.

(6) "Damages" means a loss, detriment or injury, whether to person, property, reputation or rights through any act or practice declared unlawful under the provisions of this chapter.

(7) "Disclosure label" means a printed or typed notice that is legible and easy to read and is affixed to a container in a conspicuous place on containers accessible to the public. Disclosure labels shall inform the public of the following:

(a) The approximate annual percentage paid, if any, to any individual, person or charitable organization to maintain, service or collect the contributions raised by the solicitation;

(b) The net percentage or sum paid to the specific charitable purpose in the most recent calendar year;

(c) If the maintenance, service, and collection from the container is performed by volunteers or paid individuals.

(8) "Person" means natural persons, partnerships, both limited and general, corporations, both foreign and domestic, companies, trusts, business entities, associations, both incorporated and unincorporated, and any other legal entity or any group associated in fact although not a legal entity, or any agent, assign, heir, servant, employee or representative thereof. [I.C., § 48-1202, as added by 1993, ch. 246, § 1, p. 857; am. 1996, ch. 182, § 1, p. 576.]

**Compiler's notes.** Section 501(c)(3) of the Internal Revenue Code, referred to in this section, is compiled as 26 U.S.C. § 501(c)(3).

**48-1203. Unlawful acts.** — (1) It is unlawful for any person, except a religious corporation, a religious association, a religious educational institution or a religious society, in the planning, conduct or execution of any charitable solicitation, to utilize any unfair, false, deceptive, misleading or unconscionable act or practice. In deciding whether an act or practice is unfair, false, deceptive, misleading or unconscionable within the meaning of this subsection, definitions, standards and interpretations relating thereto under the Idaho consumer protection act and regulations promulgated thereunder shall apply.

(2) It is unlawful for a religious corporation, a religious association, a religious educational institution or a religious society, in the planning,



conduct or execution of any charitable solicitation, knowingly and willfully to utilize any false, deceptive or misleading act or practice.

(3) It is unlawful for any person or charitable organization to use a container in a public place to solicit contributions by offering a product for sale knowing the container does not have a disclosure label affixed to it. However, no charitable organization shall be liable under this subsection if the container generates less than a gross amount of one hundred dollars (\$100) per year or the charitable organization generates less than a gross amount of five hundred dollars (\$500) per year from all sources for any charitable purpose or purposes. It is an absolute defense to prosecution under this subsection if the person or charitable organization soliciting contributions has given one hundred percent (100%) of the receipts generated by the container to the designated charitable organization to further the charitable purpose or purposes for which contributions were solicited. [I.C., § 48-1203, as added by 1993, ch. 246, § 1, p. 857; am. 1996, ch. 182, § 2, p. 576.]

**48-1204. Authority of the attorney general and district court. —**

(1) The attorney general and the district court shall have the same authority in enforcing and carrying out the provisions of this chapter as is granted the attorney general and district courts under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(2) All penalties, costs, and fees received or recovered by the attorney general shall be remitted to the consumer protection account and expended pursuant to subsection (5) of section 48-606, Idaho Code. [I.C., § 48-1204, as added by 1993, ch. 246, § 1, p. 857.]

**48-1205. Private causes of action and remedies. —** (1) Any person who, pursuant to a charitable solicitation, suffers damages as a result of any act, conduct, or practice declared unlawful under the provisions of this chapter, shall have the same rights and remedies in seeking and obtaining redress under the provisions of this chapter as those granted under the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

(2) The remedies provided for in this chapter are not exclusive, and shall be in addition to any other procedures or remedies for any violation or conduct provided for in other law. [I.C., § 48-1205, as added by 1993, ch. 246, § 1, p. 857.]

**48-1206. Limitation of action. —** (1) No private action may be brought under the provisions of this chapter more than two (2) years after the cause of action accrues.

(2) A cause of action shall be deemed to have accrued when the party bringing an action under the provisions of this chapter knows or in the exercise of reasonable care should have known about the violation of the provisions of this chapter. [I.C., § 48-1206, as added by 1993, ch. 246, § 1, p. 857.]

## CHAPTER 13

## MUSIC LICENSING AND COPYRIGHT ENFORCEMENT ACT

## SECTION.

48-1301. Short title.

48-1302. Definitions.

48-1303. Notice and information to be provided.

48-1304. Royalty contract requirements.

## SECTION.

48-1305. Prohibited conduct.

48-1306. Remedies — Injunction.

48-1307. Remedies cumulative.

48-1308. Exceptions.

**48-1301. Short title.** — This act shall be known and may be cited as the “Music Licensing and Copyright Enforcement Act of 1996.” [I.C., § 48-1301, as added by 1996, ch. 330, § 1, p. 1123.]

**Compiler’s notes.** The words “this act” refer to S.L. 1996, ch. 330 which is compiled as §§ 48-1301 — 48-1308.

**48-1302. Definitions.** — As used in this chapter:

(1) “Copyright owner” means the owner of a copyright of a nondramatic musical or similar work recognized and enforceable under the copyright laws of the United States pursuant to title 17 of the United States Code, P.L. 94-553 (17 U.S.C. sec. 101 et seq.).

(2) “Nondramatic” means the public performance of a recorded, broadcast, or live musical work; except that “nondramatic” shall not mean the performance of a dramatic work including a play.

(3) “Performing rights society” means an association or corporation that licenses the public performances of nondramatic musical works on behalf of copyright owners, such as the American society of composers, authors and publishers (ASCAP), broadcast music, inc. (BMI), and SESAC, Inc.

(4) “Proprietor” means the owner of a retail establishment, restaurant, inn, bar, tavern, sports or entertainment facility or any other similar place of business or professional office located in the state in which the public may assemble and in which nondramatic musical works or similar copyrighted works may be performed, broadcast or otherwise transmitted for the enjoyment of members of the public there assembled.

(5) “Royalty” or “royalties” means the fees payable to a copyright owner or performing rights society for the public performance of nondramatic musical or other similar works. [I.C., § 48-1302, as added by 1996, ch. 330, § 1, p. 1123.]

**48-1303. Notice and information to be provided.** — No performing rights society shall enter into, or offer to enter into, a contract for the payment of royalties by a proprietor unless it agrees to provide to the proprietor upon request at the proprietor’s place of business, by electronic means or otherwise:

(1) Information as to whether specific copyrighted musical works are in its repertoire; and

(2) The opportunity to review the most current available list of the performing rights society’s members or affiliates. [I.C., § 48-1303, as added by 1996, ch. 330, § 1, p. 1123.]



**48-1304. Royalty contract requirements.** — Every contract for the payment of royalties between a proprietor and a performing rights society executed, issued or renewed in the state on or after July 1, 1996 shall be:

- (1) In writing;
- (2) Signed by the parties;
- (3) Written to include, at a minimum, the following information:
  - (a) The proprietor's name and business address and the name and location of each place of business to which the contract applies;
  - (b) The name of the performing rights society;
  - (c) The duration of the contract; and
  - (d) The schedule of rates and terms of the royalties to be collected under the contract, including any sliding scale or schedule for any increase or decrease of the rates for the duration of the contract. [I.C., § 48-1304, as added by 1996, ch. 330, § 1, p. 1123.]

**48-1305. Prohibited conduct.** — No performing rights society or any agent or employee thereof shall:

- (1) Enter onto the premises of a proprietor's business for the purpose of discussing or inquiring about a contract for the payment of royalties with the proprietor or his employees, without first identifying himself to the proprietor or his employees and making known to them the purpose of the discussion or inquiry;
- (2) Engage in any coercive conduct, act or practice that is substantially disruptive to a proprietor's business;
- (3) Use or attempt to use any unfair or deceptive act or practice in negotiating with a proprietor; or
- (4) Fail to comply with or fulfill the obligations imposed by sections 48-1303 and 48-1304, Idaho Code. However, nothing in this chapter shall be construed to prohibit a performing rights society from conducting investigations to determine the existence of music use by a proprietor or informing a proprietor of the proprietor's obligation under the copyright laws of the United States pursuant to title 17 of the United States Code, P.L. 94-553 (17 U.S.C. sec. 101 et seq.). [I.C., § 48-1305, as added by 1996, ch. 330, § 1, p. 1123.]

**48-1306. Remedies — Injunction.** — Any person who suffers a violation of this chapter may bring an action to recover actual damages and reasonable attorney's fees and seek an injunction or any other remedy available at law or in equity. [I.C., § 48-1306, as added by 1996, ch. 330, § 1, p. 1123.]

**48-1307. Remedies cumulative.** — The rights, remedies and prohibitions contained in this chapter shall be in addition to and cumulative to any other right, remedy or prohibition accorded by common law, federal law or the statutes of the state, and nothing contained in this chapter shall be construed to deny, abrogate or impair any common law or statutory right, remedy or prohibition. [I.C., § 48-1307, as added by 1996, ch. 330, § 1, p. 1123.]

**48-1308. Exceptions.** — This chapter shall not apply to contracts between copyright owners or performing rights societies and broadcasters licensed by the federal communications commission, or to contracts with cable operators, programmers or other transmission services. Nor shall this chapter apply to musical works performed in synchronization with an audio/visual film or tape. [I.C., § 48-1308, as added by 1996, ch. 330, § 1, p. 1123.]

## CHAPTER 14

### ASSISTIVE TECHNOLOGY WARRANTY ACT

#### SECTION.

48-1401. Short title.

48-1402. Definitions.

48-1403. Express warranties.

48-1404. Assistive device replacement or refund.

48-1405. Nonconformity disclosure requirement.

#### SECTION.

48-1406. Manufacturer's duty to provide reimbursement for temporary replacement of assistive devices and penalties.

48-1407. Enforcement.

**48-1401. Short title.** — This chapter governing the sale of assistive technology devices may be cited as the "Assistive Technology Warranty Act." [I.C., § 48-1401, as added by 1997, ch. 276, § 1, p. 819.]

**48-1402. Definitions.** — As used in this chapter:

(1) "Assistive device" is an item, piece of equipment, or product system that is designated and used to increase, maintain or improve functional capabilities of individuals with disabilities in the areas of seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself or working. The term includes, but is not limited to: manual wheelchairs, motorized wheelchairs, motorized scooters, and other aids that enhance the mobility of an individual; hearing aids, assistive listening devices and other aids that enhance an individual's ability to hear or communicate; voice synthesized computer modules, optical scanners, talking software, braille printers, large print materials and other devices that enhance an individual's ability to access print or communicate; and other devices such as environmental controls, adaptive transportation aids, communication boards and modified environments. "Assistive device" does not include: (a) a transcutaneous electrical nerve stimulator, neuromuscular electrical stimulator, or dynamic range of motion splint, if the stimulator or splint is already covered by a warranty; (b) a hearing aid covered by a one (1) year express warranty to repair or replace a device with a nonconformity; and (c) items including canes, crutches, walkers, bathroom safety aids, batteries, blood pressure kits, glucose monitors, bandages, household aids, wraps and other disposable items.

(2) "Assistive device dealer" means a person who is in the business of selling new assistive devices.

(3) "Assistive device lessor" means a person who leases new assistive devices to consumers, or who holds the lessor's rights, under a written lease.



(4) "Collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the cost of sales tax and of obtaining an alternative assistive device.

(5) "Consumer" or "agency" means any of the following:

(a) The purchaser of an assistive device, if the assistive device was purchased from an assistive dealer or manufacturer for purposes other than resale;

(b) A person to whom the assistive device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the assistive device;

(c) A person who may enforce the warranty; or

(d) A person who leases an assistive device from an assistive device lessor under a written lease.

(6) "Demonstrator" means an assistive device used primarily for the purpose of demonstration to the public.

(7) "Early termination cost" means an expense or obligation that an assistive device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to the manufacturer. The term incurs a penalty for prepayment under a finance arrangement.

(8) "Early termination savings" means an expense or obligation that an assistive device lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to the manufacturer. The term includes an interest charge that the assistive device lessor would have paid to finance the assistive device or, if the assistive device lessor does not finance the assistive device, the difference between the total period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(9) "Manufacturer" means a person who manufactures or assembles assistive devices and agents of that person, including an importer, a distributor, a factory branch, and a warrantor of the manufacturer's assistive device. The term does not include an assistive device dealer or lessor.

(10) "Nonconformity" means a specific condition or generic defect or malfunction, or a defect or condition that substantially impairs the use, value or safety of an assistive device, but does not include a condition or defect that is the result of abuse or unauthorized modification or alteration of the assistive device by the consumer.

(11) "Reasonable attempt to repair" means any of the following occurring within the term of an express warranty applicable to a new assistive device:

(a) The manufacturer, assistive device lessor, or any of the manufacturer's authorized assistive device dealers accepts returns of the new assistive device for repair at least two (2) times; or

(b) The assistive device is out of service for an aggregate of at least thirty (30) cumulative days because of warranty nonconformities. [I.C., § 48-1402, as added by 1997, ch. 276, § 1, p. 819; am. 1998, ch. 236, § 1, p. 792.]

**48-1403. Express warranties.** — (1) A manufacturer who sells or leases a new assistive device to a consumer, either directly or through an assistive device dealer or lessor, shall furnish the consumer with an express warranty to preserve or maintain the utility or performance of the assistive device. The duration of the express warranty must not be less than one (1) year after first possession of the assistive device by the consumer. If a manufacturer fails to furnish an express warranty as required by this section, the assistive device shall be covered by an express warranty as if the manufacturer had furnished an express warranty to the consumer as required by this section.

(2) If a new assistive device does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the assistive device lessor, or any of the manufacturer's authorized assistive device dealers and makes the assistive device available for repairs before one (1) year after the first possession of the device by the consumer, the nonconformity must be repaired or replaced. [I.C., § 48-1403, as added by 1997, ch. 276, § 1, p. 819.]

**48-1404. Assistive device replacement or refund.** — If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer shall carry out, at the option of the consumer, the requirements under subsection (1) (a) or (b) or (2) of this section, whichever is appropriate.

(1) To provide for refunds, at the request of the consumer, the manufacturer shall do one (1) of the following:

(a) Accept return of the assistive device and refund to the consumer and to a holder of a perfected security interest in the consumer's assistive device, as their interest may appear, the full purchase price plus any finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use; or

(b) Accept return of the assistive device, refund to the assistive device lessor and the holder of a perfected security interest in the assistive device, as their interest may appear, the current value of a written lease and refund to the consumer the amount that the consumer paid under the written lease plus collateral costs, less a reasonable allowance for use.

(2) The manufacturer shall provide a comparable new assistive device replacing the device having the nonconformity. To receive a comparable new assistive device, the consumer shall offer to transfer possession of the assistive device to the manufacturer of the assistive device having the nonconformity. No later than thirty (30) days after that offer, the manufacturer shall provide the consumer with the comparable new assistive device or a refund, and the consumer shall return the assistive device having the nonconformity to the manufacturer, along with any endorsements necessary to transfer real possession to the manufacturer.

(3) If, after a reasonable attempt to repair, the nonconformity is not repaired, an assistive device lessor shall receive a refund from the manufacturer. To receive a refund, the assistive device lessor shall offer to transfer possession of a nonconforming assistive device to its manufacturer. No later than thirty (30) days after that offer, the manufacturer shall



provide the refund to the assistive device lessor. When the manufacturer provides the refund, the assistive device lessor shall provide to the manufacturer any endorsements necessary to transfer legal possession to the manufacturer.

(4) Under this section, the current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the assistive device dealer's early termination costs and the value of the assistive device at the lease expiration date if the lease sets forth that value, less the assistive device lessor's early termination savings.

(5) Under this section, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount the consumer paid or for which the written lease obligates the consumer by a fraction, the denominator of which is one thousand eight hundred twenty-five (1,825) and the numerator of which is the number of days that the consumer used the assistive device before first reporting the nonconformity to the manufacturer, assistive device lessor or assistive device dealer.

(6) No person may enforce the lease against the consumer after the consumer receives a refund. [I.C., § 48-1404, as added by 1997, ch. 276, § 1, p. 819.]

**48-1405. Nonconformity disclosure requirement.** — No assistive device returned by a consumer or assistive device lessor in this state or another state may be sold or leased in this state unless full disclosure of the reason for return is made to the prospective buyer or lessee. [I.C., § 48-1405, as added by 1997, ch. 276, § 1, p.].]

**48-1406. Manufacturer's duty to provide reimbursement for temporary replacement of assistive devices and penalties.** — (1) Whenever an assistive device covered by manufacturer's express warranty is tendered by a consumer to a dealer from whom it was purchased or exchanged for the repair of a defect, malfunction or nonconformity to which the warranty is applicable and at least one (1) of the following conditions exists, the manufacturer shall provide directly to the consumer for the duration of the repair period, a replacement assistive device or a rental assistive device reimbursement to pay for the cost incurred by the consumer for renting a replacement assistive device. The applicable conditions are as follows:

(a) The repair period exceeds ten (10) working days, including the day on which the device is tendered to the dealer for repair; or

(b) The defect, malfunction or nonconformity is the same for which the assistive device has been tendered to the dealer for repair on at least two (2) previous occasions.

(2) This section applies for the period of the manufacturer's express warranty. [I.C., § 48-1406, as added by 1997, ch. 276, § 1, p. 819.]

**48-1407. Enforcement.** — (1) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by

a violation of the chapter in the district court of the county where the consumer resides or where the manufacturer resides or has its principal place of business. Damages include all costs to the consumer attributable to the nonconforming device, but does not include punitive damages. The court shall award a consumer who prevails in such action the amount of any pecuniary loss, and costs and reasonable attorney's fees, and any other equitable relief the court deems appropriate.

(2) These sections shall not be construed to limit rights or remedies available to the consumer under any other law and the remedies provided under this chapter are inclusive and in addition to any other remedies provided by law.

(3) Any waiver by a consumer of rights under this chapter is void. [I.C., § 48-1407, as added by 1997, ch. 276, § 1, p. 819.]

## CHAPTER 15

### IDAHO NONPROFIT HOSPITAL SALE OR CONVERSION ACT

#### SECTION.

48-1501. Legislative findings and intent.

48-1502. Definitions.

48-1503. Notice to the attorney general.

48-1504. Attorney general review and written opinion — Time periods — Extension — District court review.

48-1505. Public meetings — Notice of time and place.

48-1506. Nonprofit hospital conversion transaction review elements.

48-1507. Rules — Authority to adopt — In-

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formation requests — Consequences of refusal to provide information.

48-1508. Contracts with agencies and consultants — Reimbursement for costs and expenses of review — Failure to pay.

48-1509. Public records.

48-1510. Penalties — Remedies.

48-1511. Private benefit.

48-1512. Application of act.

**48-1501. Legislative findings and intent.** — (1) Nonprofit hospitals hold assets in charitable trust, and are dedicated to the specific charitable purposes set forth in the articles of incorporation of the nonprofit corporations or governing papers of the nonprofit entities operating such hospitals. Nonprofit hospitals have a substantial and beneficial effect on the provision of health care to the people of Idaho, providing as part of their charitable mission free or low-cost health care.

(2) The attorney general is entrusted by law to bring actions on behalf of the public in the event of a breach of the charitable trust, pursuant to section 67-1401, Idaho Code.

(3) This act shall be cited as the "Nonprofit Hospital Sale or Conversion Act." [I.C., § 48-1501, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words "this act" refer to S.L. 2000, ch. 314, which is compiled as §§ 48-1501 — 48-1512.

**48-1502. Definitions.** — As used in this act:

(1) "Hospital" means a place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care for not less than twenty-four (24) hours in any week of two (2) or more nonrelated individuals



suffering from illness, disease, injury, deformity, or requiring care because of old age, or a place devoted primarily to providing, for not less than twenty-four (24) hours in any week, of obstetrical or other medical or nursing care for two (2) or more nonrelated individuals.

(2) "Nonprofit hospital" means any hospital, including hospitals owned by corporations, that is organized as a nonprofit concern, however structured or created. The term also includes entities owned, governed or controlled by a nonprofit hospital. The term does not include hospitals which are operated by a governmental unit.

(3) "Nonprofit hospital conversion transaction" means:

(a) The sale, transfer, lease, exchange, optioning, or conveyance of the lesser of thirty million dollars (\$30,000,000) or forty percent (40%) of the assets of a nonprofit hospital to an entity or person other than a nonprofit entity or an entity controlled by the nonprofit hospital; or

(b) The transfer of control or governance of the lesser of thirty million dollars (\$30,000,000) or forty percent (40%) of the assets of a nonprofit hospital to an entity or person other than a nonprofit entity or an entity controlled by the nonprofit hospital.

(c) "Nonprofit hospital conversion transaction" does not include contracts, in the usual course of business, between the nonprofit hospital and another entity:

(i) For the provision of services to the nonprofit hospital;

(ii) For the sale of equipment; or

(iii) For the leasing of space.

(d) Beginning on July 1, 2001, and each July 1 thereafter, the sums of thirty million dollars (\$30,000,000) referenced in subsections (3)(a) and (3)(b) of this section, shall increase or decrease in accordance with the percentage amount change in the hospital services component of the consumer price index as published by the bureau of labor statistics of the United States department of labor.

(4) "Person" means any individual, partnership, trust, estate, corporation, association, joint venture, joint stock company, insurance company or other organization.

(5) "Charitable trust interest" shall mean those factors specifically listed in section 48-1506, Idaho Code. [I.C., § 48-1502, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** For words "this act," see  
Compiler's notes, § 48-1501.

**48-1503. Notice to the attorney general.** — (1) Any nonprofit hospital shall be required to provide written notice to the attorney general prior to entering into any nonprofit hospital conversion transaction.

(2) In addition to identifying the parties to the nonprofit hospital conversion transaction and the general terms of the transaction, the notice to the attorney general provided for in this section shall include and contain relevant information related to the review factors set forth in section 48-1506, Idaho Code.

(3) This chapter shall not apply to a nonprofit hospital if the attorney general has given the nonprofit hospital a written waiver of this chapter as to the nonprofit hospital conversion transaction. [I.C., § 48-1503, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words "this chapter" refer to S.L. 2000, ch. 314 which is compiled as §§ 48-1501 — 48-1512.

**Sec. to sec. ref.** This section is referred to in §§ 48-1507, 48-1508, 48-1509, 48-1510.

**48-1504. Attorney general review and written opinion — Time periods — Extension — District court review. —** (1) No nonprofit hospital conversion transaction may close or be consummated until the time periods, as provided in this section, have expired.

(2) Within ninety (90) days of receipt of a written notice as required by section 48-1503, Idaho Code, the attorney general shall review the proposed nonprofit hospital conversion transaction and notify the nonprofit hospital in writing of his opinion. The attorney general shall review the nonprofit hospital conversion transaction to determine if it is in the charitable trust interest. In making his determination, the attorney general shall be guided by the factors set forth in section 48-1506, Idaho Code. Upon application by the attorney general, the district court may extend this period for an additional sixty (60) day period, provided the extension is necessary to obtain necessary and relevant information pursuant to section 48-1507(2) or 48-1508(1), Idaho Code.

(3) If the attorney general, in his written opinion, opposes the proposed nonprofit hospital conversion transaction, the parties to the transaction may not close or consummate the transaction for fourteen (14) days after the attorney general's opinion has been issued to allow the attorney general, in his discretion, to file suit seeking to block the transaction.

(4) If the attorney general files a lawsuit seeking to block the nonprofit hospital conversion transaction, the district court shall review, de novo, the transaction to determine if it is in the charitable trust interest. In making this determination, the district court shall use the factors set forth in section 48-1506, Idaho Code. Neither a positive nor a negative finding with regard to one (1) or more of the factors listed in section 48-1506, Idaho Code, shall necessarily mean that the nonprofit hospital conversion transaction is or is not in the charitable trust interest. [I.C., § 48-1504, as added by 2000, ch. 314, § 1, p. 1053.]

**Sec. to sec. ref.** This section is referred to in §§ 48-1508, 48-1510.

**48-1505. Public meetings — Notice of time and place. —** (1) Prior to issuing any written opinion pursuant to section 48-1504, Idaho Code, the attorney general may conduct one (1) or more public meetings, one (1) of which, if held, shall be held in the county where the nonprofit hospital's assets to be transferred are located.

(2) If a party to the intended nonprofit hospital conversion transaction requests the hearing be conducted by a hearing officer outside the attorney



general's office, a hearing officer, mutually agreed upon by the parties to the conversion transaction and the attorney general, shall be selected.

(3) At the public meeting, the attorney general or hearing officer shall hear comments from interested persons desiring to make statements regarding the proposed nonprofit hospital conversion transaction.

(4) The attorney general shall cause timely written notice to be provided regarding the time and place of the meeting through publication in one (1) or more newspapers of general circulation in the affected community, to the county board of supervisors, and if applicable, to the city council of the city where the nonprofit hospital's assets to be transferred are located.

(5) If a hearing officer is used, the parties to the nonprofit hospital conversion transaction shall pay the costs of the hearing officer. [I.C., § 48-1505, as added by 2000, ch. 314, § 1, p. 1053.]

**48-1506. Nonprofit hospital conversion transaction review elements.** — In reviewing a proposed nonprofit hospital conversion transaction, the attorney general (and the district court as necessary and applicable), shall consider:

(1) Whether the nonprofit hospital will receive fair market value for its charitable trust assets;

(2) Whether the fair market value of the nonprofit hospital's assets to be transferred has been affected by the actions of the parties in a manner that improperly causes the fair market value of the assets to decrease;

(3) Whether the proceeds of the proposed nonprofit hospital conversion transaction will be used consistent with the trust under which the assets are held by the nonprofit hospital and whether the proceeds will be controlled as funds independently of the acquiring or related entities;

(4) Whether the governing body of the nonprofit hospital exercised due diligence in deciding to dispose of the nonprofit hospital's assets, selecting the acquiring entity, and negotiating the terms and conditions of the disposition;

(5) Whether the nonprofit hospital conversion transaction will result in improper private inurement to any person as set forth in section 48-1511, Idaho Code; and

(6) Whether the terms of any management or services contract negotiated in conjunction with the proposed nonprofit hospital conversion transaction are reasonable. [I.C., § 48-1506, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words in parentheses so appeared in the law as enacted.

**Sec. to sec. ref.** This section is referred to in §§ 48-1502, 48-1503, 48-1504.

**48-1507. Rules — Authority to adopt — Information requests — Consequences of refusal to provide information.** — (1) The attorney general may adopt such rules, pursuant to chapter 52, title 67, Idaho Code, as the attorney general deems appropriate or necessary to implement this chapter.

(2) The attorney general may request that the nonprofit hospital giving notice under section 48-1503, Idaho Code, in addition to providing informa-

tion related to the review factors set forth in section 48-1506, Idaho Code, provide other information which the attorney general reasonably deems necessary and relevant to review the nonprofit hospital conversion transaction.

(3) If the nonprofit hospital declines to provide the information requested by the attorney general in subsection (2) of this section, the attorney general may apply to the court for an order requiring the disclosure of the information, which shall be granted if found to be necessary and relevant. [I.C., § 48-1507, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words "this chapter" refer to §§ 48-1501 — 48-1512.

**Sec. to sec. ref.** This section is referred to in § 48-1504.

**48-1508. Contracts with agencies and consultants — Reimbursement for costs and expenses of review — Failure to pay.** — (1) Within the time periods designated in section 48-1504, Idaho Code, the attorney general may do any of the following to assist in the review of the proposed nonprofit hospital conversion transaction described in section 48-1503, Idaho Code:

(a) Contract with, consult, and receive advice from any agency of the state or the United States on such terms and conditions the attorney general deems appropriate; or

(b) In the attorney general's sole discretion, contract with such experts or consultants the attorney general deems appropriate to assist the attorney general in reviewing the proposed nonprofit hospital conversion transaction.

(2) Any costs incurred by the attorney general pursuant to this section shall not exceed an amount that is reasonable and necessary to conduct the review of the proposed nonprofit hospital conversion transaction. The attorney general shall be exempt from the provisions of any applicable state laws regarding public bidding procedures for purposes of entering into contracts pursuant to this section.

(3) The attorney general, after reviewing the nonprofit hospital conversion transaction, may submit a claim to the board of examiners for reimbursement of his reasonable costs and expenses incurred in reviewing the transaction. Upon submission of a claim from the attorney general, the board of examiners may authorize the issuance of deficiency warrants for the purpose of reimbursing the attorney general reasonable and actual costs, but not attorney's fees, associated with actions taken pursuant to this chapter. Deficiency warrants authorized by the board of examiners under this section shall not exceed one hundred thousand dollars (\$100,000) for reimbursement of all claims as a result of the attorney general's review of a transaction under this chapter. Upon authorization of deficiency warrants by the board of examiners in accordance with the provisions of this section, the state controller shall, after notice to the state treasurer, draw deficiency warrants in the authorized amounts against the general account. [I.C., § 48-1508, as added by 2000, ch. 314, § 1, p. 1053.]



**Compiler's notes.** The words "this chapter" refer to §§ 48-1501 — 48-1512.

**Sec. to sec. ref.** This section is referred to in § 48-1504.

**48-1509. Public records.** — All documents submitted to the attorney general by any person, including nonprofit hospital entities giving notice under section 48-1503, Idaho Code, in connection with the attorney general's review of the proposed nonprofit hospital conversion transaction pursuant to this chapter shall be deemed records contained in court files of judicial proceedings, as provided for in section 9-340A(2), Idaho Code, and shall only be subject to public disclosure, pursuant to a public document request, in the same manner as set forth in that section. [I.C., § 48-1509, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words "this chapter" refer to §§ 48-1501 — 48-1512.

**48-1510. Penalties — Remedies.** — (1) In his discretion, the attorney general may apply to the district court for an order voiding any nonprofit hospital conversion transaction entered into in violation of the notice and disclosure requirements of section 48-1503(1), Idaho Code. Each member of the governing boards and the chief executive officers of the parties to the nonprofit hospital conversion transaction may be subject to a civil penalty of up to ten thousand dollars (\$10,000) for knowingly failing to notify the attorney general of the nonprofit hospital conversion transaction, or for violating the provisions of section 48-1511, Idaho Code, as applicable. The amount of any civil penalty shall be determined by the district court in the county in which the nonprofit hospital's assets to be transferred are located. No such penalty may be imposed under this section merely because the attorney general files suit under section 48-1504, Idaho Code, or because the district court enters an order that the nonprofit hospital conversion transaction at issue is not in the charitable trust interest. The attorney general shall institute proceedings to impose such a penalty.

(2) Nothing in this chapter shall be construed to limit the common law authority of the attorney general regarding charitable trusts and charitable assets in this state. The provisions of this chapter are in addition to, and not a replacement for, any other actions which the attorney general may take under either the common law or statutory law, including rescinding the nonprofit hospital conversion transaction, granting injunctive relief or any combination of these and other remedies available under common law or statutory law. [I.C., § 48-1510, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** The words "this chapter" refer to §§ 48-1501 — 48-1512.

**48-1511. Private benefit.** — No person who is an officer, director, board member or other fiduciary of a nonprofit hospital shall receive anything of value, beyond ordinary compensation, that relates to a nonprofit hospital conversion transaction described in this act and is of such a character as to have the appearance of an improper influence on the person with respect to the person's duties; provided however, that an officer or employee of the

nonprofit hospital may accept a job with, perform duties for, and receive ordinary compensation from, the purchasing or converting entity. Any person who violates the provisions of this section shall, in addition to being subject to the provisions of section 48-1510, Idaho Code, forfeit the items of value received in violation of this section. [I.C., § 48-1511, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** For words "this act," see Compiler's notes, § 48-1501.

**Sec. to sec. ref.** This section is referred to in § 48-1506.

**48-1512. Application of act.** — This act applies to all acquisitions, the consummation of which occurs after the effective date of this act. [I.C., § 48-1512, as added by 2000, ch. 314, § 1, p. 1053.]

**Compiler's notes.** For words "this act," see Compiler's notes, § 48-1501.

In this section "effective date of this act" refers to July 1, 2000.

## CHAPTER 16

### HEALTH-RELATED CASH DISCOUNT CARDS

#### SECTION.

48-1601. Unlawful practices — Exceptions.

48-1602. Court actions upon violation.

#### SECTION.

48-1603. Designation of agent.

**48-1601. Unlawful practices — Exceptions.** — It shall be unlawful and a violation of this chapter for any person to sell, market, promote, advertise or otherwise distribute any card or other purchasing mechanism or device, which is not insurance, that purports to offer discounts or access to discounts from health care providers in health-related purchases where:

(1) Such card or other purchasing mechanism or device does not expressly provide in bold and prominent type that the discounts are not insurance;

(2) Such discounts are not specifically authorized by an individual and separate contract with each health care provider listed in conjunction with the card or other purchasing mechanism or device; or

(3) The discounts or access to discounts offered or the range of discounts or access to the range of discounts offered are misleading, deceptive or fraudulent, regardless of the literal wording used.

(4) Nothing in this chapter shall be construed to apply to:

(a) A customer discount or membership card issued by a store or buying club for use at that store or buying club;

(b) A benefit administered by an insurer, a carrier or a managed care organization as defined in sections 41-103, 41-2212 and 41-3903, Idaho Code, respectively. [I.C., § 48-1601, as added by 2000, ch. 185, § 1, p. 454.]

**Compiler's notes.** The words "this chapter" refer to S.L. 2000, ch. 185, which is compiled as §§ 48-1601 — 48-1603.

Section 2 of S.L. 2000, ch. 185 provided that the act shall be in full force and effect on and after July 1, 2000.



**48-1602. Court actions upon violation.** — (1) The attorney general of the state of Idaho, any person, firm, private corporation, municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this chapter and for the recovery of damages.

(2) Any person subject to liability under this section shall be deemed, as a matter of law, to have purposefully availed himself of the privileges of conducting activities within Idaho, sufficient to subject the person to the personal jurisdiction of the district court hearing an action brought pursuant to this chapter.

(3) An action for violation of this section may be brought:

- (a) In the county where the plaintiff resides;
- (b) In the county where the plaintiff conducts business; or
- (c) In the county where the card or other purchasing mechanism or device was sold, marketed, promoted, advertised or otherwise distributed.

(4) If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of this chapter, it shall enjoin the defendant from a continuance thereof. It shall not be necessary, except to recover for actual damages under subsection (5) of this section, that actual damages to the plaintiff be alleged or proved.

(5) In addition to injunctive relief, the plaintiff in the action shall be entitled to recover from the defendant:

- (a) One hundred dollars (\$100) per card or other purchasing mechanism or device sold, marketed, promoted, advertised or otherwise distributed within the state of Idaho, or ten thousand dollars (\$10,000), whichever is greater;
- (b) Three (3) times the amount of the actual damages, if any sustained;
- (c) Reasonable attorney's fees;
- (d) Costs; and
- (e) Any other relief which the court deems proper.

(6) All actions under this section shall be commenced within two (2) years after the date on which the violation of this chapter occurred or within two (2) years after the person bringing the action discovered, or in the exercise of reasonable diligence, should have discovered, the occurrence of the violation of this chapter. The period of limitation provided in this section may be extended for a period of one hundred eighty (180) days if the person bringing the action proves by a preponderance of the evidence that the failure to timely commence the action was caused by the defendant's engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone commencement of the action.

(7) Any defendant in an action brought under the provisions of this chapter may be required to testify as provided by law. In addition, the books and records of any such defendant may be brought into court and introduced, by reference, into evidence.

(8) The remedies prescribed in this section are cumulative and in addition to any other remedies prescribed by law, and in addition to any other applicable criminal, civil or administrative penalties. [I.C., § 48-1602, as added by 2000, ch. 185, § 1, p. 454.]

**Compiler's notes.** The words "this chapter" refer to S.L. 2000, ch. 185, which is compiled as §§ 48-1601 — 48-1603.

Section 2 of S.L. 2000, ch. 185 provided that the act should be in full force and effect on and after July 1, 2000.

**48-1603. Designation of agent.** — Any person who sells, markets, promotes, advertises or otherwise distributes any card or other purchasing mechanism or device, which is not insurance, that purports to offer discounts from health care providers in health-related purchases in Idaho, shall designate an agent who is a resident of Idaho, for service of process and register such agent with the secretary of state. [I.C., § 48-1603, as added by 2000, ch. 185, § 1, p. 454.]

**Compiler's notes.** Section 2 of S.L. 2000, ch. 185 provided that the act should be in full force and effect on and after July 1, 2000.



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